

HAD9RAH1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 CR 760 (RMB)

5 AHMAD KHAN RAHIMI,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 October 13, 2017  
9:18 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge  
13 and a jury

14 APPEARANCES

15 JOON H. KIM  
16 Acting United States Attorney for the  
16 Southern District of New York  
17 EMIL BOVE  
17 ANDREW DeFILIPPIS  
17 SHAWN CROWLEY  
18 Assistant United States Attorneys

19  
20 FEDERAL DEFENDERS OF NEW YORK  
20 Attorneys for Defendant  
21 SABRINA SHROFF  
21 MATTHEW LARSEN  
22 MEGHAN GILLIGAN  
22 RACHEL MARTIN

23 ALSO PRESENT: Special Agent Joanna Maroudas, FBI  
24 Paralegal Ayushe Misra, U.S. Attorney's Office  
24 Paralegal Dante O'Connell, Federal Defenders of NY  
25 Investigator Anna Finkel, Federal Defenders of NY

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(Trial resumed; jury not present)

THE COURT: So, for the attorneys, we gave you an additional copy of the jury instructions this morning. There are -- I had found a couple of things that needed to be changed. I don't think there's anything really substantive.

So I'm happy to go through them with you if you want to hear them. I think there's one on your table, right?

So let me quickly run through them. They're really very minor, I think. So on page six, for example, on the second full paragraph I deleted the phrase "the explosive device of" I think that's just randomly there, doesn't belong.

And then on -- down on the same page, stipulations I struck "and/or testimony." Incidentally, I changed on line five, the word "charges" to "charge."

On page seven I took a comma out in the seventh line after the word "function."

And on page nine the seventh line of the first full paragraph I think the word should be "matter" instead of "manner."

Then the next to the last line I think the word should be "crimes" plural instead of "crime."

On 13, line 4, I inserted "or she" is an expert after "he is an expert."

On page 21, in the paragraph that begins "first," on the next line I think it should be "of," facility of interstate

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1 commerce.

2 Page 29, in the second full paragraph, at the end of  
3 that line I think it should be "crimes" plural instead of  
4 crime.

5 And here on 31 there's a few changes. So, first, I  
6 took out the first three lines, which is the definition of  
7 explosion. The operative word here is "explosive" and that is  
8 defined. There is no use of explosion I don't think in this  
9 charge.

10 And then down in, toward the bottom, the last full  
11 paragraph, "I have already defined," the phrase I think that  
12 should be there, "affecting interstate or foreign commerce for  
13 you," instead of "interstate commerce."

14 And then on the top of page 32, where it currently  
15 says "damage the building" it should be "damage any building,  
16 vehicle, or real or personal property." I've changed it to  
17 read that way.

18 Then in the first two full paragraphs I've changed the  
19 word "just" to "previously."

20 On page 37 in the -- toward the bottom of the page I  
21 took out the phrase "I have just described for you," because I  
22 didn't.

23 On page 39, in the fifth line up from the bottom, I  
24 changed "any" to "either."

25 And on page 44, in similar acts, the third line, I

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1 changed that to be the "conduct charged" instead of "the  
2 charge."

3 And then five lines up from the bottom should be  
4 "crimes" plural.

5 Then on page 45 in the second full paragraph, third  
6 line it should be "acts" plural instead of "act."

7 I think that's about it.

8 MR. BOVE: Thank you, Judge.

9 THE COURT: Yes.

10 MR. BOVE: Just one issue to raise with respect to the  
11 deletion on page 31 of the definition of explosion. I -- this  
12 was in the parties' joint requested charge and I think it was  
13 out of place in the submission that we made to the Court and we  
14 agree that it should be taken out from page 31. But we think  
15 that it does make sense to include it when your Honor first  
16 defines explosive under Count Three. So I think right now in  
17 the charge.

18 THE COURT: What page and line?

19 MR. BOVE: 25, line 4 is the end of the definition --  
20 is the reference to explosion in the definition of explosive.

21 THE COURT: Page 25, line 4.

22 Yes. May cause an explosion.

23 MR. BOVE: So we would ask that rather than deleting  
24 the definition of explosion, you just move that definition up  
25 to page 25.

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1 THE COURT: After the word explosion?

2 MR. BOVE: That makes sense to us, Judge. Thank you.

3 THE COURT: Is that okay with you?

4 MR. LARSEN: We think it's self-explanatory. We agree  
5 with the Court's position.

6 THE COURT: Any other comment? Anything from the  
7 defense?

8 You know what, I think -- I think I'm going to leave  
9 it out because all it says is explosion is defined as commonly  
10 understood and really what we're talking about there is  
11 explosive, even there. So I don't think there's any harm in  
12 not including it, unless somebody feels really strongly about  
13 it. Is that okay?

14 MR. BOVE: That's fine with us, Judge.

15 THE COURT: Is that okay?

16 MR. LARSEN: Yes.

17 THE COURT: So the jury is here. We're going to call  
18 them in.

19 (Continued on next page)

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Summation - Ms. Shroff

1 (Jury present)

2 THE COURT: Please be seated everybody. And we turn  
3 to the defense for summation.

4 MS. SHROFF: The government warned you yesterday. We  
5 warned you to look out for a cover story. Ladies and gentlemen  
6 of the jury, we have no cover story for you. At the very  
7 beginning of this trial we told you we are not here to  
8 challenge every witness and every exhibit. And we hope that  
9 you feel that we kept our word to you. There were 52  
10 witnesses. Of the 52 witnesses, we cross-examined 25.

11 And as we told you at the beginning of this case, this  
12 case hits close to home. And I was not paying you lip service  
13 when I said that. We did not then and we do not now question  
14 the pain, the hurt that each one of those victims felt. And  
15 because we do not doubt the pain and because we accept and feel  
16 every part of their hurt, we did not question them, not once.

17 But there were parts of the government's case that we  
18 questioned, and the parts of the government's case that we  
19 questioned, we questioned them not to distract you. I hope you  
20 also know that.

21 We questioned them -- we questioned those witnesses  
22 because it is our right. It is not just a right but it is our  
23 duty. It is my duty because those questions and the answers  
24 that came from those questions allow me to talk to you now and  
25 tell you why there are reasons, many reasons to doubt the

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Summation - Ms. Shroff

1 government's case on the 27<sup>th</sup> Street counts.

2 Those are Counts Two, Five, and Eight of the  
3 indictment. And you should find Mr. Rahimi not guilty on  
4 Counts Two, Five, and Eight.

5 So let me talk to you about these three counts. These  
6 three counts accuse Mr. Rahimi of attempting to use a bomb.  
7 And as Judge Berman will instruct you, the crime of attempt  
8 requires proof, proof beyond a reasonable doubt that the  
9 defendant intended to commit a specific offense.

10 Here, in this case that means that the government must  
11 prove, it must be proved that Mr. Rahimi intended to set off  
12 those bombs that he left on 27<sup>th</sup> Street and, as the judge  
13 will tell you, proof of that intent on each count must be  
14 beyond all reasonable doubt.

15 Reasonable doubt is the most difficult of burdens to  
16 shoulder. And for Counts Two, Five, and Eight, and Judge  
17 Berman will explain this to you further, if you acquit, as you  
18 should, on Counts Two and Five you must also acquit on Count  
19 Eight. In other words, because the government will fail to  
20 meet their burden of proof on Two and Five, on Counts Two and  
21 Five of the indictment, they also fail to meet their burden on  
22 Count Eight.

23 So let me explain what I'm talking about. The  
24 government has the burden of proving far more than Mr. Rahimi  
25 possibly or probably intended to use the 27<sup>th</sup> Street bomb.

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Summation - Ms. Shroff

1 In fact, the government must prove that he had such an intent  
2 beyond all reasonable doubt. That means that if there is even  
3 one reason, one reason alone to doubt whether he truly intended  
4 to use the bomb on 27<sup>th</sup> Street, the government has, in fact,  
5 failed to carry their burden of proof.

6 As I said before, this is my opportunity to review the  
7 evidence and the lack of evidence with you and show you the  
8 reasons to doubt.

9 Now, let's start with the most obvious of facts, the  
10 most obvious reason you should doubt. The bomb on 27<sup>th</sup>  
11 Street was never used. You know that because the bomb did not  
12 go off. There was no device used on 27<sup>th</sup> Street.

13 Now in his summation yesterday Mr. Bove called  
14 Mr. Rahimi a sophisticated bombmaker, a sophisticated bombmaker  
15 who understands how to put these things together and what they  
16 will do.

17 You don't have to take my word for it. You can ask  
18 Judge Berman to give you the transcript. The government said  
19 to you such was Mr. Rahimi's sophistication that he planned the  
20 Seaside Park and the 23<sup>rd</sup> Street bombings for months and  
21 carried them out with tactical precision. Mr. Bove pointed to  
22 a lot of evidence to support that claim, the claim that they  
23 made to you.

24 And if you credit that claim, if you credit what  
25 Mr. Bove said to you in his opening statement yesterday, then



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Summation - Ms. Shroff

1 you must also credit the evidence showing that Mr. Rahimi is  
2 someone who knows how to use a bomb if he wants to.

3 So the fact that the 27<sup>th</sup> Street bomb did not go off  
4 is your first reason to doubt whether Mr. Rahimi wanted or  
5 intended it to be put to use on 27<sup>th</sup> Street.

6 Now, Mr. Bove was absolutely right. He was absolutely  
7 right when he told you that a bomb does not have to go off for  
8 somebody to be guilty of attempting to use it. But he was  
9 wrong. He was very wrong, absolutely and totally wrong when he  
10 told you that the 27<sup>th</sup> Street bomb did not go off because two  
11 men who found that suitcase handled the bomb in ways that the  
12 defendant hadn't and in doing so they dislodged one of the  
13 wires, one of the parts of the fusing system.

14 There is no such evidence in this case. It is  
15 speculation from the government and, as Judge Berman will tell  
16 you, you cannot and should not base your verdict on  
17 speculation. Not only is it speculation, not only is the  
18 government's evidence and argument of yesterday unsupported by  
19 the evidence, it is, in fact, contradicted by the very evidence  
20 they introduced here.

21 Not only is there no evidence that one of the two men  
22 dislodged the wires, the government's own evidence disproves  
23 the arguments that they made yesterday to you that the wires  
24 were dislodged. And what was that evidence and who did it come  
25 from? That evidence came from Detective Hallik.

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Summation - Ms. Shroff

1 Now you all remember Detective Hallik so let's just  
2 talk about Detective Hallik. Detective Hallik is the man who  
3 testified, you remember. He testified that he had worked with  
4 bombs for years in Afghanistan, Iraq, and now in New York, for  
5 the New York police department bomb squad. He is the member of  
6 the NYPD bomb squad who diffused the 27<sup>th</sup> Street bomb.

7 Now, how do we know that? We know that because the  
8 government called him as their witness and had him testify to  
9 that. And what else did he testify to? He testified that when  
10 he arrived at 27<sup>th</sup> Street, you remember he was specifically  
11 called to respond to 27<sup>th</sup> Street, he was shown a picture of  
12 the pressure cooker that was at 27<sup>th</sup>, the device.

13 And what did Detective Hallik say? He said the first  
14 thing we noticed, the first thing -- and remember, he told you  
15 he is trained, he's methodical. He's precise. He is careful.  
16 And he has spent years honing that skill, the skill of  
17 observation and evaluation. He is touching what he called one  
18 of the most dangerous devices. So you know he was careful.

19 He testified that when he first arrived on 27<sup>th</sup>  
20 Street he was shown a photo of the pressure cooker that was  
21 there. He said, and I quote, "The first thing we noticed was  
22 there was a cellphone attached to the pressure cooker and wires  
23 attached to the cellphone inside the lid of the pressure  
24 cooker." It's not my witness. It's their witness.

25 Take a look at the testimony, ladies and gentlemen.

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Summation - Ms. Shroff

1 The first thing Detective Hallik noticed was the cellphone with  
2 the wires attached to the pressure cooker. And what does he  
3 tell us that he did after that? He observed the device and,  
4 after the observation, after he took a careful look at the  
5 device, he decided on a plan of attack. That is what he told  
6 you.

7 Detective Hallik then went on to explain to all of you  
8 that he used a robot to remove the cellphone from the pressure  
9 cooker. He testified, "As I was removing the cellphone, the  
10 wires connected to the cellphone going to the lid of the  
11 device, they tightened. They got taught and then snap." It  
12 was then and only then that the wires snapped. It was then and  
13 only then that those wires were dislodged.

14 It is the man who actually diffused the 27<sup>th</sup> Street  
15 bomb, the NYPD bomb squad technician who tells you that he  
16 remembers very clearly -- he remembered very clearly that the  
17 cellphone wires were attached to the pressure cooker and  
18 because they were attached they were tightened when he used the  
19 robot to pull the cellphone away and that is when the wires  
20 snapped.

21 Ladies and gentlemen of the jury, the wires had not  
22 been dislodged before then as the government claimed before you  
23 for the first time yesterday. The wires were there and they  
24 were attached.

25 You remember what Detective Hallik told you, what

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Summation - Ms. Shroff

1 Detective Hallik told you when he was asked about why diffusing  
2 the bomb took so long. What did he say? He said you don't  
3 want to rush. You do not want to rush my job. He's absolutely  
4 right. You don't want to rush his job. Why? Because he's  
5 trained to take his time. He's trained to observe, to take a  
6 look at the device, observe it thoroughly, map out a plan, and  
7 then put that plan in action. And he did precisely that at the  
8 scene. He took his time, was very methodical, and this very  
9 methodical person clearly remembered and clearly testified  
10 under oath that the phone wires were still attached to the  
11 pressure cooker and based on that observation he mapped out a  
12 game plan.

13 So that is how we know from Detective Hallik that  
14 there is no truth to the government's argument of yesterday and  
15 that argument is proven wrong by the government's own witness.

16 Now you must be wondering, you must be wondering why  
17 I'm highlighting for you the fact that the wires were still  
18 attached to the device. Doesn't that mean -- doesn't that mean  
19 that the bomb was still capable of going off? The answer is  
20 yes. In fact, even if the wires had been cut the bomb still  
21 would have been capable of being used. But the fact that the  
22 bomb was capable of being used does not mean that Mr. Rahimi  
23 intended to use it.

24 Now the law draws a line. It draws a line between  
25 acts that are intentional and acts that are callous, acts that

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Summation - Ms. Shroff

1 are dangerous, and even acts that are horribly callous and  
2 dangerous. And, believe me, we know. We know that that is a  
3 very difficult line to walk sometimes, especially when the  
4 allegations are such as the allegations in this case, and they  
5 are hard to listen to.

6 So, look, you can despise Mr. Rahimi for doing  
7 something so heinous as leaving a bomb on 27<sup>th</sup> Street on a  
8 public street in the middle of New York City. You could. But  
9 leaving a bomb on a public street isn't what Counts Two, Five,  
10 and Eight of the indictment allege. Counts Two Five and Eight  
11 of the indictment charge Mr. Rahimi with attempting to use the  
12 bomb, use the bomb on 27<sup>th</sup> Street.

13 And, again, at the risk of repeating myself attempt  
14 requires not just leaving a bomb on the street. It requires  
15 the government to prove to you beyond a reasonable doubt that  
16 leaving the bomb on a street with the intent that it go off.

17 So, the first reason to doubt Mr. Rahimi's intent is  
18 the fact that the 27<sup>th</sup> Street bomb did not, in fact, go off.

19 Now, the government has told you, it has said  
20 repeatedly that the Seaside Park and the 23<sup>rd</sup> Street  
21 explosion show that Mr. Rahimi is a sophisticated bombmaker.  
22 They spent a lot of time telling you that. And they put in a  
23 lot of evidence before you yesterday making just that point.  
24 They want you to take as a given that Mr. Rahimi is someone who  
25 knows how to use a bomb when he wants to. So the fact that the

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Summation - Ms. Shroff

1 27<sup>th</sup> Street bomb did not go off tells you that Mr. Rahimi had  
2 no such intent.

3 Now what else tells you that he did not have the  
4 intent to set off a bomb on 27<sup>th</sup> Street? The alarm. Let's  
5 talk about this alarm supposedly set for 9 p.m. or, as Agent  
6 DeFusco called it, the countdown timer. The government tells  
7 you to take as a given, they tell you accept it as true that  
8 the cellphone was set to vibrate at 9 p.m. Take it is what  
9 they said. But I tell you there are serious reasons to doubt  
10 that that fact is, in fact, correct.

11 First, 9 p.m. came and went. No bomb went off. There  
12 was no explosion.

13 Now you heard testimony from Special Agents Mcfarlane  
14 and DeFusco. If there had been an alarm set at 9 o'clock, what  
15 would have happened? They told you -- these are, again, their  
16 experts who told you -- they told you that if an alarm had been  
17 set for 9 o'clock, then at 9 o'clock the phone would have  
18 vibrated. That vibration would have sent an electrical charge  
19 through the wires, through the Christmas light, which would  
20 have ignited the chemicals and made the bomb explode.

21 But that didn't happen. So ask yourself. Why not?  
22 Well, we know it isn't because of the two men who purportedly  
23 dislodged the wires. And it isn't because there was anything  
24 wrong with the phone. And you know there was nothing wrong  
25 with the phone. Why do you know there was nothing wrong with

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Summation - Ms. Shroff

1 the phone? Because they paraded witness after witness telling  
2 you just that. You remember all of the FBI agents, all of the  
3 FBI agents who testified about that phone, starting with  
4 Special Agent Enyart. She testified that she had the phone.  
5 She got the phone from 27<sup>th</sup> Street. You remember the  
6 pictures. She had them laid out on the ground. She moved them  
7 from one spot to another but didn't take a photo of the phone  
8 open. But she did testify that she got the phone from 27<sup>th</sup>  
9 Street, flipped it open, and saw that the power was on. She  
10 specifically told you -- they called her, remember, after  
11 Special Agent Leung. They called Jill Enyart to tell you. And  
12 that agent was credentialed top to bottom. And they gave you  
13 her credentials, all of the other investigations that she had  
14 participated in.

15 So, according to them, and I ask you to accept what  
16 the government is saying about her qualifications, she is well  
17 trained, she is precise, she knows what she's doing. She's a  
18 special agent of years of experience they told you. And what  
19 did she tell you? She told you when she turned the phone off  
20 it was powered. The power was on. Special Agent Enyart noted  
21 that the phone was in working order.

22 What did she do with the phone? She put it in the  
23 cardboard box, gave it to another agent, and that agent drove  
24 that phone to the FBI lab in Quantico, Virginia. And, there,  
25 they handed over that phone to Agent Mcfarlane and Agent

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Summation - Ms. Shroff

1 DeFusco. And both their teams, Agent Mcfarlane's team and  
2 Agent DeFusco's team worked on that phone and performed every  
3 test imaginable. They subjected that phone to all kinds of  
4 tests.

5 They told you that had the alarm been set and had it  
6 gone off as programmed, it would cause the vibrate motor to  
7 send a charge through the wires, up the Christmas tree light.  
8 And they conducted forensic tests. They conducted the forensic  
9 exams to see if anyone had done that by either calling or  
10 texting that phone because they also told you -- the  
11 government's own experts told you this -- they told you that  
12 they could activate the vibrate motor by doing just that, by  
13 calling or texting that phone.

14 So let's go back to the evidence they introduced.  
15 Fifty-two witnesses and there is no evidence whatsoever that  
16 there were any calls or any texts to that phone. We saw no  
17 evidence of any alarm going off. None at all. All we heard  
18 was the claim from the government that an alarm had been set  
19 for 9 p.m. And, again, ask yourself, please: What was that  
20 claim based on? That claim was based on something that Agent  
21 Mcfarlane never mentioned in his direct testimony.

22 So I asked him during my cross-examination. It turns  
23 out Mr. Mcfarlane based that claim on an unnamed software  
24 program, an unnamed software program written by the FBI, a  
25 program that only the FBI uses. No one knows anything else



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Summation - Ms. Shroff

1 about that program. No one else is allowed to peer review it.  
2 And nobody else can test it. Nobody else can find out how it  
3 is written or how it is run or whether it's properly written or  
4 properly run. You just have to take their word for it.

5 So I ask you: Isn't it possible -- isn't it possible  
6 that this unnamed, untested, unpeer-reviewed program just did  
7 not get it right? If it had been right and there had been a  
8 9 p.m. alarm, then an alarm would have gone off at 9 p.m. And  
9 that alarm would have caused pressure. And that pressure would  
10 have caused the explosion. And that we know did not happen  
11 here. That is one more reason for you to doubt.

12 And there is yet another reason, ladies and gentlemen  
13 of the jury. It is reason to doubt, even if we assume that  
14 there was actually an alarm set for 9 o'clock and, again, I  
15 take you back to Agent Mcfarlane. Agent Mcfarlane admitted  
16 that he did not know if that 9 p.m. alarm was, in fact,  
17 overridden. I just want you to recall. Recall that the 9 p.m.  
18 alarm, assuming that it existed at all, it was set -- it was  
19 set to go off everyday. It wasn't set to go off specifically  
20 on that day, September 17.

21 And recall that Agent Mcfarlane also told you -- he  
22 also admitted that he had no idea and there is no record  
23 evidence to tell you who set the alarm, when the alarm was set,  
24 or, in fact, it ever was set. From this, again, Judge Berman  
25 will instruct you, you can logically infer that Mr. Rahimi

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1 overrode that alarm because he simply did not want to use the  
2 bomb on 27<sup>th</sup> Street.

3 Now you might wonder why Mr. Rahimi would do that,  
4 right. I mean the government has pointed to a lot of evidence  
5 that Mr. Rahimi set off the bombs at Seaside Park and 23<sup>rd</sup>  
6 Street and he did so after years of reading and mulling over  
7 violent rhetoric from the *Inspire* magazine and lectures of  
8 people like Anwar al-Awlaki.

9 But the government really cannot have it both ways.  
10 If the government is right in its claims of Mr. Rahimi being a  
11 sophisticated bombmaker with only evil in his heart on a  
12 mission to kill, then he would have detonated the bomb on  
13 27<sup>th</sup> Street. He did not.

14 And the evidence suggests one reason why, one  
15 additional reason why. And like the Seaside Park blast there  
16 is no evidence that Mr. Rahimi was present for that or heard  
17 about it or heard it. But the evidence does show that he heard  
18 the 23<sup>rd</sup> Street explosion.

19 Several witnesses, none of which we cross-examined,  
20 testified, testified as to how loud that explosion was, the  
21 sound of the explosion. Jane Schreibman, the person who called  
22 911 and lives three blocks away on 26<sup>th</sup> Street, she told us.  
23 She told us that she heard what turned out to be a bomb on  
24 23<sup>rd</sup> Street when she was on 26<sup>th</sup> street and thought it must  
25 be thunder. Considering that she heard it, Mr. Rahimi heard it

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1 too. The evidence shows he was somewhere, right. He was  
2 somewhere between 23<sup>rd</sup> and 27<sup>th</sup> when the 23<sup>rd</sup> Street  
3 explosion occurred.

4 And after he heard that explosion on 23<sup>rd</sup> Street,  
5 the one fact that even the government cannot dispute, is that  
6 there were no more explosions. None. There was no explosion  
7 on 27<sup>th</sup> Street. And if you believe the government,  
8 Mr. Rahimi had every chance to make that happen. He could have  
9 set the alarm. He could have called that phone. He could have  
10 texted that phone. Each of those three things would have set  
11 that bomb off. And you know that did not happen because the  
12 bomb did not go off.

13 Now they also showed you a video. Now what we saw on  
14 that video, contrary to what the government wants you to  
15 believe, was Mr. Rahimi abandoning that pressure cooker on  
16 27<sup>th</sup> Street. Not because Mr. Rahimi was stopped by someone  
17 not because of a technical defect. He did so because he chose  
18 to. And that choice was made after he heard the blast on  
19 23<sup>rd</sup> Street.

20 We saw 40 minutes of that video. For 40 minutes of  
21 Mr. Rahimi sitting and thinking. He was sitting and thinking  
22 over what he truly intended to do. And whatever you decide,  
23 whatever you decide that he did on 23<sup>rd</sup> Street, he did not,  
24 did not attempt to use any bomb or any device on 27<sup>th</sup>.

25 Now the government when they showed you that video

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Summation - Ms. Shroff

1 yesterday called those 40 minutes pauses, pauses that  
2 Mr. Rahimi took to stick to his schedule, to stick to his  
3 bombing schedule is what they told you.

4 But, ladies and gentlemen, really they cannot have  
5 it -- the government cannot have it both ways. If those were  
6 just pauses to accommodate a sophisticated bombmaker's  
7 schedule, then he would have used the bomb. But he did not.  
8 He chose not to. And there is your lack of intent.

9 Now there is even more reason to doubt, more reason to  
10 doubt Mr. Rahimi had any alleged intent and that is what he did  
11 after he left 27<sup>th</sup> Street.

12 Now, as you know -- and again there is no doubt of the  
13 evidence here -- after leaving 27<sup>th</sup> Street Mr. Rahimi still  
14 had -- and they've told you this over, and over, and over  
15 again -- he still had with him a backpack full of six pipe  
16 bombs. Six more chances to set off bombs, six more chances to  
17 cause harm, if he had intended to do that.

18 But he did not set off a single one of those six  
19 bombs. Not in Penn Station. Not anywhere else in Manhattan.  
20 Not anywhere on the trains that he took back to get back to  
21 New Jersey. And not anywhere in Elizabeth, New Jersey.

22 And the government has again repeatedly emphasized for  
23 you the extreme dangerousness of carrying those pipe bombs  
24 around the city in crowded places such as Penn Station. And we  
25 agree. I mean of course it is dangerous. It's extremely

HAD9RAH1

Summation - Ms. Shroff

1 dangerous. And extremely uncalled for. But don't let the  
2 government confuse you with this. The risk, and undoubtedly  
3 there is a risk, the risk that one of those bombs might have  
4 gone off is not proof that Mr. Rahimi intended it to go off.  
5 You may not substitute that for intent.

6 So what does he do when he gets to Elizabeth? When he  
7 arrived at Elizabeth he dropped the backpack in the trash  
8 outside the station and, again, very significantly he did not  
9 light the fuse.

10 And you know, again through the government's  
11 witnesses, that to set off those bombs you have to light the  
12 fuse. But not a single one was lit. There is no -- there is  
13 no debate about that. The record evidence is clear. Not one  
14 was lit. No fuse was lit.

15 We did hear how the robot accidentally detonated one  
16 of those pipe bombs. And they testified that they could have  
17 gone off and that one accidentally did, in fact, go off. But,  
18 again, that is not proof that Mr. Rahimi intended it to go off.  
19 And it certainly isn't proof that he intended the 27<sup>th</sup> Street  
20 bomb to go off.

21 Now, look, there was a passage of time and Mr. Rahimi  
22 had every opportunity to use the bomb on 27<sup>th</sup> Street. He did  
23 not. And do not -- do not let the government in their rebuttal  
24 tell you or suggest, as it did in its opening, that this was  
25 not for lack of trying.

HAD9RAH1

Summation - Ms. Shroff

1 As we know from the evidence, the two men didn't stop  
2 him. There was nothing wrong with the cellphone. Those are  
3 not the reasons. So let's review the reasons we have so far to  
4 doubt whether Mr. Rahimi ever intended the bomb to go off.

5 The bomb never goes off.

6 Second, the bomb never went off despite Mr. Rahimi  
7 having countless opportunities to use it.

8 Third, the bomb never went off despite there being  
9 nothing standing in Mr. Rahimi's way. And we've seen -- I've  
10 already told you this -- there were no wires that were  
11 dislodged and nothing was wrong with that phone.

12 Fourth, the claim of the 9 p.m. alarm being set comes  
13 from the FBI's untested software program and quite possibly got  
14 things wrong given that nothing happened at 9 p.m.

15 Fifth, even if that program was right and even if  
16 there was an alarm, they told you that -- their own witness  
17 told you that Mr. Rahimi could have overridden that alarm. And  
18 quite possibly that is true because the alarm didn't go off.

19 So these are all reasons to doubt Mr. Rahimi's intent.

20 And then there are six more reasons. There are six  
21 more reasons when you think of the chances he had and refused  
22 to set off those six pipe bombs.

23 A sophisticated bombmaker, any sophisticated bombmaker  
24 who is intent on setting off that explosive and killing as many  
25 people as possible would simply light the fuse and leave. If

HAD9RAH1

Summation - Ms. Shroff

1 he really wanted to kill as many people as possible as the  
2 government would have you believe, he would not have passed up  
3 the opportunity to do so to set off those six pipe bombs.

4 But Mr. Rahimi did pass up that opportunity.

5 Now, again, in their main summation yesterday the  
6 government listed for you some of the things that it says,  
7 according to them, show Mr. Rahimi's intent with the 27<sup>th</sup>  
8 Street bomb. I think I've responded to all of them. I've  
9 talked to you about the 9 p.m. alarm. And I'm not going to go  
10 over that because I've done it already.

11 But the government has also cited the fact that  
12 Mr. Rahimi left that bomb on the street and from that they ask  
13 you to say that he had that intent. But, again, I've already  
14 told you leaving the bomb on a street is not enough.  
15 Callousness, carelessness, is not intent. No matter what they  
16 say on their rebuttal do not confuse that with intent.

17 They also told you that you can infer -- you should,  
18 they said, in fact, infer this intent. And then they talked to  
19 you quite a bit about how the pressure cooker was packed with  
20 BBs and shrapnel. You remember they brought you that little  
21 pressure cooker here. And they said to you that that obviously  
22 means -- that was the word he used, "obviously," obviously  
23 means that Mr. Rahimi intended to use it. Mr. Bove came up to  
24 you, to the jury box, to the sill here and he pretended to put  
25 it together for you, put that dangerous device and said it

HAD9RAH1

Summation - Ms. Shroff

1 obviously shows Mr. Rahimi's intent.

2 Whenever the government says "obviously," you should  
3 take a hard look at what the government uses and means for that  
4 word. To say "obviously" to satisfy their burden to try and  
5 meet the standard that is as demanding as proof of a reasonable  
6 doubt, you should reject their invitation.

7 The government also talked to you and made several  
8 references to the dangerousness of the bomb and the good luck,  
9 the miracle that it did not go off accidentally. Again, that's  
10 not intent. Of course a bomb was dangerous. It's a bomb. It  
11 was dangerous. And, of course, of course we're grateful that  
12 it did not go off. But that does not take you to -- that does  
13 not mean the government has met its burden of proof on whether  
14 or not Mr. Rahimi intended to use that bomb. If he had that  
15 intent for all of the time that passed, for his trip from  
16 New York to New Jersey he could have, he would have set off  
17 that bomb. Nothing stood in his way.

18 Finally, where they started, the government started  
19 with what they call Mr. Rahimi's letter, the letter, the  
20 letter -- his written confession. But, again, that is just yet  
21 another attempt to try and confuse on the issue of intent.  
22 What matters is not what Mr. Rahimi wrote in that notebook but  
23 what he did and what he did not do, what he did not do on  
24 27<sup>th</sup> Street and thereafter. He did not use the bomb. He did  
25 not set off the bomb. He did not detonate the bomb on 27<sup>th</sup>



HAD9RAH1

Summation - Ms. Shroff

1 Street. And he did not set off any one of those six pipe  
2 bombs.

3 Look, from all of the evidence that you've heard here  
4 and from all of what the government has told you about  
5 Mr. Rahimi, you have no reason to do him any favors. Okay.  
6 And we're not asking you to do Mr. Rahimi any favors. What  
7 we're asking you to do is simply what you have already agreed  
8 to do, why we all chose you to serve as jurors here, what you  
9 said you would do, and that's all really I'm asking you to do.

10 I'm simply asking you to hear the arguments I have  
11 made today and to then hold the government to their burden of  
12 proof beyond a reasonable doubt.

13 Now, they also told you yesterday in deliberating on  
14 the counts charged that you should use your common sense. I  
15 say that to my 14-year-old all the time. Of course, use your  
16 common sense. What does your common sense tell you here? Your  
17 common sense tells you that this is a man who knows how to  
18 detonate a bomb and if he wanted to he would have. He would  
19 have done so on 27<sup>th</sup> Street and he would have done so with  
20 the additional six pipe bombs that he had.

21 At any point over the next day-and-a-half, he had a  
22 day-and-a-half as he made his way through three busy bus train  
23 stations, traveling back to New Jersey, at any point the whole  
24 day-and-a-half more he could have set off any one of those  
25 seven bombs and he did not. There would have been seven more

HAD9RAH1

Summation - Ms. Shroff

1 explosions, and there were not.

2 Now you already know this but I will repeat it here.  
3 Mr. Rahimi is facing some very serious charges with respect to  
4 the 23<sup>rd</sup> Street and whatever you decide on 23<sup>rd</sup> Street  
5 charges, whatever you decide on those charges, there are still  
6 multiple reasons for you to doubt his guilt on Counts Two,  
7 Five, and Eight. He is not guilty on Counts Two, Five, and  
8 Eight.

9 So I'm done. I have not sought to distract you. And  
10 I hope we kept our word of what we said at the opening. And  
11 this is a difficult case. It is a difficult case for all of  
12 us. We are really all New Yorkers.

13 And I am going to sit down now because I'm done with  
14 my argument to you. And the government gets another chance.  
15 They do. They get to get up now and they get one more round,  
16 their rebuttal summation. And when they do I really do not  
17 know what they will say and I have no way to get back up and,  
18 you know, it never fails, no matter how many times you stand up  
19 in front of a jury, when you sit back down you always say to  
20 yourself: I should have said this, or I should have  
21 mentioned that, I forgot this.

22 But I am confident that you who have been listening to  
23 all of us, every one of us carefully and thoroughly, and I  
24 thank you for listening to me, that you have the answers to  
25 rebut anything that Mr. DeFilippis throws at me after I sit

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 down. You've listened to all of the facts. And I know that  
2 you will be able to answer anything he says on the points that  
3 I have raised in my summation to you this morning.

4 You have all the answers and all the answers take you  
5 to one place and one place alone on Counts Two, Five, and  
6 Eight. On Counts Two, Five, and Eight he, Mr. Rahimi, is not  
7 guilty.

8 I really do thank you very much for listening to me  
9 and serving as jurors today.

10 THE COURT: Thank you, Ms. Shroff.  
11 Counsel.

12 MR. DeFILIPPIS: Thank you, your Honor.

13 Ladies and gentlemen, what you just heard was a cover  
14 story. And it was a cover story straight out of the al-Qaeda  
15 playbook.

16 Ladies and gentlemen, you saw video after video in  
17 this case in which the defendant walked away, walked away from  
18 the crimes he was committing, his terrorist attack, walking  
19 away from one bomb to plant another bomb, walking away so he  
20 wouldn't get caught before the attack was complete, walking  
21 away so that he wouldn't get hurt while others bled, walking  
22 away from the victims he targeted, the innocent men, women, and  
23 children he tried to kill. And today, ladies and gentlemen,  
24 the defendant is trying to walk away one last time from that  
25 bomb on 27<sup>th</sup> Street.

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 Ladies and gentlemen, he's admitting what he can't  
2 deny and he's denying what he can't admit. He can't deny the  
3 overwhelming evidence, the mountains of evidence that he  
4 planted that bomb on 23<sup>rd</sup> Street and knew it would go off,  
5 wanted it to go off. And now he's trying to slither out of  
6 what he wanted to do on 27<sup>th</sup> Street because your common sense  
7 tells you what he wanted to do on 27<sup>th</sup> Street, ladies and  
8 gentlemen. You heard today a partial confession through  
9 Ms. Shroff that everything else you saw and heard about that  
10 day happened and it happened because he wanted to.

11 And it's an insult to your common sense to think that  
12 this is a case of half intent, that is a case of cold feet.  
13 This was not cold feet, ladies and gentlemen. This was cold  
14 and calculating attack. This was cold blood.

15 Now, ladies and gentlemen, as I said this was a cover  
16 story. We're going to walk through just exactly why it's a  
17 cover story, why you know, why the common sense, why your  
18 common sense and the evidence shows you that it was a cover  
19 story.

20 Let's look first, ladies and gentlemen, on the  
21 instructions, the source, the inspiration that the defendant  
22 follows and planned to carry out these attacks. *Inspire*  
23 magazine. Al-Qaeda's magazine. It says "Have a convincing  
24 cover story for anything suspicious. The story needs to be  
25 good enough to convince a jury if you ever get that far."

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 Ladies and gentlemen, you have paid close attention.  
2 You've been attentive and carefully looked at, listened to the  
3 evidence. And I know that the defense's argument is not going  
4 to be enough to convince you because the defendant is guilty of  
5 each and every count in that indictment.

6 So let's go through Ms. Shroff's arguments one by one.  
7 And let's first consider the idea that the defendant somehow  
8 set out from his house that morning with a series of bombs,  
9 nine bombs in his backpack, and that he somehow only wanted  
10 some of them to go off. He wanted to do a partial attack,  
11 carry around a bunch of bombs that only some would explode.

12 That's ridiculous, ladies and gentlemen. That is  
13 ridiculous. You saw the image of him leaving Elmora that  
14 morning, 5:09 a.m. on his way to Seaside Park where he would  
15 detonate a bomb. And after that another bomb on 23<sup>rd</sup> Street.  
16 And after that another bomb planted on 27<sup>th</sup> Street. You know  
17 that his plan was set before he walked out the door that day  
18 because he walked out the door that day with all the equipment  
19 he needed to carry out the attack he wanted to.

20 Now, ladies and gentlemen, the defense has made a big  
21 point of the fact that that 27<sup>th</sup> Street bomb did not go off  
22 and has implied to you that that is itself a  
23 get-out-of-jail-free card, a legal defense. It is not a legal  
24 defense, ladies and gentlemen. The fact that the bomb didn't  
25 go off has nothing to do with whether the defendant attempted

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 to commit the attack on 27<sup>th</sup> Street.

2 Why? I expect the judge is going to instruct you that  
3 as long as the defendant took substantial steps in furtherance  
4 of his crime he's guilty of attempt. You didn't just see the  
5 defendant take the substantial steps. You saw him take step,  
6 after step, after step as he went through Penn Station carrying  
7 that bomb, as he went through the streets of Manhattan carrying  
8 that bomb, as he planted the one on 23<sup>rd</sup> Street and took more  
9 steps, bringing it to its ultimate destination, as he turned  
10 and looked at that hotel across the street encased in glass  
11 windows and left the bomb there on 27<sup>th</sup> Street across the  
12 street from an outdoor restaurant.

13 Ladies and gentlemen, if the defendant hadn't intended  
14 that bomb to go off, if he hadn't intended to kill people, he  
15 could have done any number of things. He could have taken it  
16 back with him. He could have called 911. He could have  
17 announced to the world that he no longer wanted to carry out  
18 these attacks. He didn't do that.

19 He left that bomb there with high explosives, HMTD,  
20 explosives that Robert Mothershead, the government's expert,  
21 told you and that David DeFusco, the government's other expert  
22 told you, could detonate, could explode through friction,  
23 through jostling, through movement. He left it there knowing  
24 that.

25 Now, ladies and gentlemen, the defense has said that

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 being reckless is not -- that being reckless is not enough.

2 And I want to bring up to you a slide that you saw yesterday  
3 about Count Five. That's the attempted destruction of property  
4 count pertaining to the 27<sup>th</sup> Street bomb.

5 Ladies and gentlemen, there are three elements.

6 That the defendant used an explosive in an attempt to  
7 destroy property.

8 Ladies and gentlemen, by placing that bomb there alone  
9 knowing it contained high -- HMTD a high explosive, black  
10 powder, another explosive, by placing it there in the middle of  
11 busy Manhattan, he attempted to use it. He attempted to use it  
12 as he approached there to place it there. He took substantial  
13 steps to put people in grave danger. And how do you know  
14 that's enough?

15 Because if you look at the third element as to whether  
16 the defendant acted maliciously, that is satisfied. I expect  
17 the judge will instruct you if he used an explosive with the  
18 intent to cause damage or harm, or in a reckless disregard to  
19 the likelihood of damage or harm.

20 Ladies and gentlemen, your common sense tells you he  
21 intended to cause damage and harm. If the defendant had his  
22 way, there would have been bodies on the street on 27<sup>th</sup>  
23 Street. That's what he wanted at 23<sup>rd</sup> Street. That's what  
24 he wanted on 27<sup>th</sup> Street.

25 But let's take the defense's ridiculous argument and

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 entertain it for a moment. Let's say all he intended to do was  
2 place this bomb there. Let's say you didn't hear from Agent  
3 DeFusco or Michael McFarlane, two of the government's experts  
4 who described to you how the Christmas tree light was perfectly  
5 configured so that if it received the electric charge it would  
6 go off.

7 Let's pretend you didn't hear any of that. Let's  
8 pretend all you knew was that this defendant walked up to that  
9 mailbox, placed this bomb there knowing what he put in it.  
10 That's enough. He attempted to use it. He placed it there.  
11 So, ladies and gentlemen, your job is not as difficult as the  
12 defense has tried to make it sound.

13 Now let's get a little bit more specific about some of  
14 the arguments they made.

15 You heard a lot of talk about this alarm. And it was  
16 difficult to hear from the defense's argument whether -- did  
17 they intend you to believe that the alarm was set or it wasn't?  
18 In the beginning Ms. Shroff said it was set for 9 p.m. And  
19 then she talked about Mr. McFarlane's report and tried to cast  
20 doubt on it because it was based on an FBI program.

21 Ladies and gentlemen, your common sense tells you it  
22 makes complete sense that that alarm was set for 9 p.m. and it  
23 makes complete sense that the defendant wanted it to go off.  
24 Why? Because you saw the scheduled precision that he acted  
25 with as he planted the other bomb. He showed up a little bit



HAD9RAH1

Rebuttal - Mr. DeFilippis

1 early on 23<sup>rd</sup> Street and he sat on those church steps.

2 Now Ms. Shroff wants you to believe that that's  
3 because he was thinking about what he wanted to do. Ladies and  
4 gentlemen, he wasn't thinking about what he wanted to do. He  
5 wasn't getting cold feet. As Mr. Bove explained to you, that  
6 bomb went off at 8:30. It had a cellphone attached to it. You  
7 saw it, the little scraps of LG cellphone from that phone. You  
8 know that that phone was set for 8:30 and he wanted to leave  
9 about a half-hour so that he could walk away, walk away from  
10 that bomb, so he was in safety, while other people felt the  
11 blast, and go on to 27<sup>th</sup> Street. And again, ladies and  
12 gentlemen, he waited, he paused, and then he placed the bomb.  
13 You know that a 9 p.m. alarm showing up wasn't a wake-up alarm.  
14 You know that alarm was intended to make that bomb go off.

15 Now you heard a lot of discussion about these two men,  
16 Mr. Bove's assertion yesterday that these two men who came up  
17 to the bomb jostled it likely disarming it. Now, Ms. Shroff  
18 was simply misguided and perhaps didn't understand the  
19 configuration of this bomb.

20 MS. SHROFF: Objection.

21 THE COURT: Overruled.

22 MR. DeFILIPPIS: If we could bring up Government  
23 Exhibit 302-6.

24 Ladies and gentlemen, Ms. Shroff was very focused on  
25 the wires on the outside of this bomb and she made a big

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Rebuttal - Mr. DeFilippis

1 pointed of fact that Detective Hallik, when he defused the  
2 bomb, when he detached those wires, that they couldn't have  
3 been detached before because that's what Detective Hallik did.

4 Ladies and gentlemen, Mr. Bove was not referring to  
5 those wires here, the wires on the outside of the bomb. There  
6 were wires -- the wires went into the phone. There were wires  
7 inside the pot attached to the Christmas tree lights. There  
8 were any number of reasons why jostling this by those two men  
9 could disarm this bomb, prevent it from doing what the  
10 defendant wanted it to do.

11 Ladies and gentlemen, it is a ridiculous assertion to  
12 say that the defendant would carry six bombs in a backpack, two  
13 bombs in luggage, bring them to the site, to one site, let that  
14 bomb go off -- Ms. Shroff conceded that he heard that bomb go  
15 off -- let it go off and then place another one in a place just  
16 crowded enough to cause damage and he hoped death but not so  
17 crowded that it wouldn't be discovered in time he hoped.

18 Ladies and gentlemen, it was a miracle that those two  
19 men just happened to walk by, expose this bomb and allow Jane  
20 Schreibman to pick it up, to call 911, the very thing that this  
21 defendant would have done if he really had gotten cold feet, if  
22 he didn't want that bomb to go off. That's not what the  
23 defendant did. He left that bomb there. He walked it there  
24 knowing what it contained and under the law that is enough for  
25 him to have used it, excuse me -- to attempt to use that bomb.

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 Now another definition that you'll be asked to  
2 consider in the jury instructions, ladies and gentlemen, is a  
3 destructive devise. Was this a destructive device? Is the  
4 defendant guilty of carrying a destructive device in his  
5 attempt to set off the bomb at 27<sup>th</sup> Street?

6 Ladies and gentlemen, this is my point about the HMTD,  
7 about the Mothershead testimony you heard about how volatile  
8 and dangerous it is. That bomb was a destructive device,  
9 ladies and gentlemen. It includes any explosive bombs in a  
10 device is considered a destructive device so long as it is  
11 capable of exploding. No plausible argument there, ladies and  
12 gentlemen. No discussion. The defendant attempted to use a  
13 destructive device on 27<sup>th</sup> Street.

14 Now, ladies and gentlemen, the defense also argued  
15 that the government can't have it both ways. They argue that  
16 the defendant knew how to set off a bomb if he wanted to. He  
17 was sophisticated. He would have if he wanted to. That  
18 argument does not pass the smell test, ladies and gentlemen.  
19 You read his journal. "Bombs will be heard in the streets."  
20 Bombs. Not one bomb.

21 The defendant knew how to build a bomb. He spent  
22 months in his bedroom making that HMTD which was found in his  
23 bedroom. He spent months with that black powder. He knew how  
24 to make a bomb but, as you heard from Mr. Mcfarlane,  
25 Mr. DeFusco, they're extremely technically complicated. There

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Rebuttal - Mr. DeFilippis

1 are any number of reasons why a bomb might not go off. Why  
2 after designing it with all the proper circuitry, with an  
3 igniter, with a fuel why the bomb might not go off. And the  
4 question for you is: Was that the design of the bomb? Was  
5 that a miracle that saved lives but not a miracle of the  
6 defendant's making?

7 And I want to remind of you Government Exhibit 303-1A.

8 Ladies and gentlemen, this is the cellphone that was  
9 on that bomb, the cellphone that bore his fingerprint on the  
10 inside of that phone, right where the wire is connected to make  
11 its murderous circuitry work.

12 So you know that in the months he planned this attack  
13 he took scientific precision and care to construct these  
14 devices, to make sure they worked. He made every effort to  
15 make these tools of murder and jihad.

16 And it makes no sense to think that he would  
17 successfully plant a bomb in Seaside Park, one that went off.  
18 It makes no sense to think he wouldn't hear or know that that  
19 bomb went off. That was his plan. Obviously he would check.  
20 He would know before moving on to the second phase of his plan  
21 whether the first one went off. And Ms. Shroff concedes he  
22 knew that the second one went off. So they want you to believe  
23 that a man who spent months constructing these devices, getting  
24 instruction from al-Qaeda's playbook, from ISIS, that he  
25 suddenly decided he didn't want them to go off. It doesn't

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Rebuttal - Mr. DeFilippis

1 pass the smell test, ladies and gentlemen. It's not true.

2 Now, another argument they made in this regard is  
3 about these Elizabeth bombs, the six bombs found near the train  
4 station. And once again, ladies and gentlemen, this is a  
5 pathetic defense. They want you to believe that the fact that  
6 he left six pipe bombs with high explosives at a train station  
7 two hours before rush hour, the fact that he left them there is  
8 a defense, shows he didn't want to kill people, that he didn't  
9 want that 27<sup>th</sup> Street bomb to go off.

10 Now the fuses on those bombs, it's true, they weren't  
11 lit. But, again, ladies and gentlemen what was in those bombs?  
12 HMTD. You heard Agent DeFusco tell you how even the slightest  
13 movements of those bombs, to that material, is like smacking a  
14 cobra. You may do it once, twice, three times, nothing will  
15 happen. But it's not something that you should do.

16 Ladies and gentlemen, the reason the defendant didn't  
17 light those bombs is because after stalking through Manhattan,  
18 planting his bombs, the core part of his attack was complete.  
19 He carried those bombs back to Penn Station. You saw the video  
20 of him with the backpack. If he no longer wanted to carry out  
21 his jihad, he wouldn't have done that. He waited before he  
22 went back to New Jersey. Remember, it was the next afternoon  
23 before he went back. Because he knew that if he were to go  
24 immediately through Penn Station, an area full of police and  
25 security, he knew he might get caught. And those bombs, the

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 way they were designed, they were different. They weren't  
2 bombs to plant and leave. They were bombs he could use if the  
3 police were to come after him, use them like grenades. He  
4 could use them to fend off an attack in case people came for  
5 him. Ladies and gentlemen, they do not negate in any way the  
6 defendant's intent for the 27<sup>th</sup> Street bomb to go off.

7 Now at the end of the day, ladies and gentlemen, we've  
8 asked you throughout this trial to use your common sense.  
9 We've asked you to look at the evidence. And the evidence here  
10 is overwhelming. The defendant planned a methodical,  
11 calculated and cold-blooded attack, an attack that began with  
12 his radicalization in 2012, that continued in that summer of  
13 2016, as he carefully constructed these bombs, as he made his  
14 way to Seaside Park, as he made his way into Manhattan to  
15 23<sup>rd</sup> Street and then onto 27<sup>th</sup> Street.

16 Ladies and gentlemen, this is a cover story. It  
17 doesn't matter whether 27<sup>th</sup> Street bomb, how it was  
18 configured, whether that configuration was ultimately  
19 successful. A bank robber who goes into a bank holds up the  
20 teller and his gun doesn't work, he's still a bank robber. A  
21 kidnapper who takes his victim and the victim gets away at the  
22 last minute, he's still a kidnapper. The fact that the  
23 defendant's plan failed on 27<sup>th</sup> Street is not a defense.

24 And I submit to you, ladies and gentlemen, that the  
25 most powerful evidence of his intent is what you saw at 23<sup>rd</sup>

HAD9RAH1

Rebuttal - Mr. DeFilippis

1 Street. In carrying out those acts, the defendant answered the  
2 call of ISIS, the call of al-Qaeda. His duty, as he saw it,  
3 was jihad and his goal was to kill as many New Yorkers as he  
4 could.

5 Ladies and gentlemen, that was his duty as he saw it.  
6 Now it's your time. It's time for you to do your duty as  
7 jurors. And here in this American courtroom you have one job  
8 and one call and that is to render a fair and impartial verdict  
9 based on the evidence and the evidence alone. That's what you  
10 promised to do when you raised your hand in front of this Court  
11 and each other. You promised to do justice, a form of justice  
12 that the defendant certainly wasn't willing to provide the  
13 victims of his bombings.

14 Ladies and gentlemen, it's a heavy duty. It's an  
15 important duty, but in some ways your job here is easy. That's  
16 because the evidence just doesn't leave any room for the  
17 conclusion that the defense is asking you to draw. Every bit  
18 of the defendant's action, every bit of his planning, every bit  
19 of his execution on that day tells you, shows you, proves to  
20 you that he wanted more bloodshed, more destruction.

21 There was no doubt, ladies and gentlemen, in the voice  
22 of Vicky Feria as she got up on that stand and told you how the  
23 defendant's bombs made her family drop in terror, shattering  
24 her windows, but not her will to go on despite her  
25 disabilities.

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Rebuttal - Mr. DeFilippis

1           There was no doubt in the voice of Helena Ayeh who was  
2 feet away from being killed by that huge dumpster, nearly lost  
3 her eye but got through the night with the help of a stranger  
4 who told her to pray.

5           There was no doubt in the testimony of Tsitsi Merritt  
6 when she told you through tears how she looked at her  
7 ten-year-old son lifeless and unresponsive in the back of a  
8 car.

9           There was no doubt in Cort Cheek's description of the  
10 quote "doomsday" he saw from his wheelchair.

11           And there was no doubt, ladies and gentlemen, in the  
12 testimony of NYPD Detective Jason Hallik who disarmed the  
13 defendant's bomb, the bomb he wanted to go off, and prevented  
14 another doomsday on 27<sup>th</sup> Street.

15           Ladies and gentlemen, in carrying out his jihad, his  
16 holy war, the defendant violated each and every count of that  
17 indictment, each and every one. And in carrying out your  
18 duties as jurors you should reach the one conclusion that's  
19 consistent with the law, with the evidence, and with justice,  
20 which is that the defendant is guilty as charged.

21           THE COURT: Thanks a lot.

22           (Continued on next page)

23  
24  
25



HADQRAH2

1 THE COURT: (Continued) What is next is the jury  
2 charge or jury instructions. They take a good hour or so,  
3 maybe a little bit more. Why don't we take a really short  
4 break, and then we will get to that. Thanks.

5 (Jury recessed)

6 MR. LARSEN: Your Honor, we have some issues to raise  
7 without the jury, or should we do that now?

8 THE COURT: It's a very strange time to raise issues.

9 MR. LARSEN: There are objections to the government's  
10 rebuttal.

11 THE COURT: I will hear them later.

12 MR. LARSEN: We are making them because we think they  
13 require, at minimum, instructions to the jury.

14 THE COURT: I don't understand that, actually, because  
15 rebuttal is just argument of lawyers; it's not fact of any  
16 kind, and if you had them, you probably should have asked for a  
17 sidebar while he was making them. I'm not entertaining legal  
18 issues at this time.

19 MR. LARSEN: You're refusing to entertain our  
20 objections?

21 THE COURT: No, I'm asking you to put them in writing  
22 and submit them to me in the proper fashion. I'm not doing it  
23 on the fly at this point in time. I'm going to bring in the  
24 jury, and I'm going to give them the jury instructions.

25 MR. LARSEN: I feel obliged to raise issues, your

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1 Honor.

2 THE COURT: Well, I know you do, but I just gave you  
3 the answer.

4 MR. LARSEN: We've made --

5 THE COURT: I just gave you the answer, counsel.  
6 Enough is enough.

7 MR. LARSEN: So I understand the Court will not hear  
8 an oral objection?

9 THE COURT: Get the jury, please.

10 MS. SHROFF: Your Honor, I'm sorry, I need one minute  
11 with Mr. Larsen.

12 THE COURT: We are calling the jury in right now.

13 (Jury present)

14 THE COURT: Everybody please be seated.

15 We are up to the point, as I said before, when I read  
16 to you the final jury instructions or charges. They are, and  
17 often are, they are in this case, rather lengthy. It's  
18 probably going to take at least about an hour or so to get  
19 through them. You are certainly free and welcome to take notes  
20 if you wish, but you should know that it is my practice to give  
21 each of the jurors a verbatim copy of the instructions that I'm  
22 going to read to you to take into the jury room. I think that  
23 may help in your deliberations.

24 Generally, so you get a sense of what I am about to  
25 read, there are two overall types of instructions: Those that

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1 we use in virtually every case and those that explain the  
2 specific eight counts in this case. In my opinion, in  
3 understanding these counts, those charges that relate to the  
4 counts in the case and the elements of each count, they are  
5 somewhat technical in nature and that's why I think you may be  
6 helped by having these written instructions later on for your  
7 deliberations.

8 So you have now heard all of the evidence in the case,  
9 as well as the final arguments of the lawyers for both sides.  
10 My duty at this point is to instruct you as to the law. It is  
11 your duty to accept these instructions of law and apply them to  
12 the facts as you determine them, just as it has been my duty to  
13 preside over the trial and decide what testimony and what  
14 evidence is relevant under the law for your consideration.

15 On these legal matters, you must take the law as I  
16 give it to you. If any attorney has stated a legal principle  
17 different from any that I state to you in my instructions, it  
18 is my instructions that you must follow.

19 You should not single out any instruction as alone  
20 stating the law, but you should consider my instructions as a  
21 whole when you retire to deliberate in the jury room. As I  
22 said before, you will receive a copy of these instructions  
23 along with a verdict sheet to be filled out by the jurors, and  
24 to take that with you also into the jury room. Your decision,  
25 your verdict, must be unanimous.

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1           You should not, any of you, be concerned about the  
2 wisdom of any rule that I state regardless of any opinion that  
3 you may have as to what the law may be or ought to be. It  
4 would violate your sworn duty to base a verdict upon any other  
5 view of the law than the one I give you.

6           Your role, as I have said earlier, since the first day  
7 we met, is to consider and decide the fact issues in this case.  
8 You, the members of the jury, are the sole and exclusive  
9 determiners of the facts. You pass upon the evidence; you  
10 determine the credibility or believability of the witnesses;  
11 you resolve whatever conflicts may exist in the testimony; you  
12 draw whatever reasonable inferences and conclusions you decide  
13 to draw from the facts as you have determined them; and you  
14 determine the weight of the evidence as well.

15           In determining the facts, you must rely on your own  
16 independent recollection of the evidence. What the lawyers  
17 have said in their opening statements and in their closing  
18 arguments, in their objections or in their questions is not  
19 evidence, nor is anything I may have said during the trial or  
20 may say during these instructions about a fact issue to be  
21 taken instead of your own independent recollections. What I  
22 say is not evidence. In this connection, remember that a  
23 question put to a witness is never evidence. It is only the  
24 answer that is evidence. But you may not consider any answer  
25 as to which I sustained an objection or that I may have

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1 directed you to disregard or that I may have directed be struck  
2 from the record.

3 If there is any difference or contradiction between  
4 what any lawyer has said in their arguments to you and what you  
5 decide the evidence showed or between anything I may have said  
6 and what you decide the evidence showed, it is your view of the  
7 evidence -- not the lawyers' and not mine -- that controls.

8 I also ask you to draw no inference from the fact that  
9 upon occasion I may have asked questions of certain witnesses.  
10 These questions were intended only for clarification or to move  
11 things along, and certainly were not intended to suggest any  
12 opinions on my part as to the verdict you should render or  
13 whether any of the witnesses may have been more credible than  
14 any other witnesses. It is important that you understand that  
15 I wish to convey no opinion as to the verdict you should render  
16 in this case, and that if you nevertheless believe that I did  
17 convey an opinion, you would not be obliged in any way to  
18 follow it.

19 In determining the facts, you must weigh and consider  
20 the evidence without regard to sympathy, prejudice or passion  
21 for or against any party and without regard to what the  
22 reaction of the parties or the public might be to your verdict.  
23 I will later discuss with you how to pass upon the credibility  
24 of the witnesses.

25 We've talked about the indictment in this case. The

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1 indictment is not evidence. It merely describes the charges or  
2 counts made against the defendant, of which there are eight.  
3 It is a set of accusations. It may not be considered by you as  
4 evidence of the guilt of the defendant. Only the evidence or  
5 lack of evidence decides that issue.

6 A copy of the indictment will be furnished to you when  
7 you begin your deliberations along with these instructions and,  
8 by the way, along with the exhibits in this case.

9 Count One of the indictment charges the defendant with  
10 using a weapon of mass destruction in connection with his  
11 alleged involvement with a pressure cooker device that  
12 detonated on September 17, 2016 on 23rd Street in Manhattan.  
13 Throughout my instructions, I will refer to this as the 23rd  
14 Street device.

15 Count Two charges the defendant with using a weapon of  
16 mass destruction and attempting to use a weapon of mass  
17 destruction in connection with his alleged involvement with a  
18 pressure cooker device that was recovered on September 17, 2016  
19 from 27th Street in Manhattan. Throughout my instructions, I  
20 will refer to this as the 27th Street device.

21 Count Three charges the defendant with bombing a place  
22 of public use in connection with his alleged involvement with  
23 the 23rd Street device.

24 Count Four charges the defendant with destroying  
25 property by means of an explosive in connection with his

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1 alleged involvement also with the 23rd Street device.

2 Count Five charges the defendant with attempting to  
3 destroy property by means of an explosive in connection with  
4 his alleged involvement with the 27th Street device.

5 Count Six charges the defendant with transporting an  
6 explosive in interstate commerce in connection with his alleged  
7 involvement with both the 23rd and 27th Street devices.

8 Counts Seven and Eight charge the defendant with using  
9 and carrying a destructive device during and in relation to a  
10 crime of violence or possessing a destructive device in  
11 furtherance of a crime of violence. Count Seven relates to the  
12 defendant's alleged possession and use of the 23rd Street  
13 device, and Count Eight relates to the defendant's alleged  
14 possession and use of the 27th Street device.

15 Let's talk a minute about evidence. The evidence from  
16 which you are to decide what the facts consist of include:

17 First, the sworn testimony of witnesses on both direct  
18 and cross-examination;

19 Second, the documents and exhibits that were received  
20 into evidence;

21 And, third, any stipulations of fact.

22 Nothing else is evidence.

23 You should draw no inference or conclusion for or  
24 against any party by reason of lawyers making objections or my  
25 rulings on such objections. Counsel have not only the right

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1 but the duty to make legal objections when they think that such  
2 objections are appropriate. You should not be swayed for or  
3 against either side simply because counsel for any party has  
4 chosen to make an objection, nor should you be swayed by any  
5 ruling I made on an objection. Whether or not I may have  
6 sustained more objections for one side or the other has no  
7 bearing on your function to consider all of the evidence that  
8 was admitted during the trial.

9 Further, please do not concern yourself with what was  
10 said at sidebar conferences or during my discussions with  
11 counsel, nor does it make any difference whether any lawyer or  
12 I asked for a sidebar conference. Those discussions related to  
13 rulings of law and not to matters of fact.

14 At times I may have admonished a lawyer or a witness  
15 or directed a witness to be responsive to questions or to keep  
16 his or her voice up. At times I may have questioned a witness  
17 myself or made comments to a lawyer. Any questions that I  
18 asked or instructions or comments that I gave were intended  
19 only to move things along or to clarify the presentation of  
20 evidence and to bring out something which I thought may have  
21 been unclear. You should draw no inference or conclusion of  
22 any kind, favorable or unfavorable, with respect to any witness  
23 or any party in the case by reason of any comment, question or  
24 instruction of mine, nor should you infer that I have any views  
25 as to the credibility of any witness, as to the weight of the



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1 evidence or as to how you, the jury, should decide any issue  
2 that is before you. That is entirely your role.

3 The defendant has pled not guilty to the charges in  
4 the indictment. As a result of his plea of not guilty, the  
5 burden is on the prosecution, as you've heard; that is to say,  
6 the government, to prove the defendant's guilt beyond a  
7 reasonable doubt. This burden never shifts to the defendant  
8 for the simple reason that the law never imposes upon a  
9 defendant in a criminal case the burden or duty of testifying  
10 himself or calling any witnesses or of locating or producing  
11 any evidence.

12 The law presumes the defendant to be innocent of the  
13 charges against him. I, therefore, instruct you that the  
14 defendant is to be presumed by you to be innocent when the  
15 trial began and throughout your deliberations and until such  
16 time, if it comes, that you as a jury are unanimously satisfied  
17 that the government has proved him guilty beyond a reasonable  
18 doubt.

19 The presumption of innocence alone is sufficient to  
20 acquit the defendant unless you as jurors are unanimously  
21 convinced beyond a reasonable doubt of his guilt, after a  
22 careful and impartial consideration of all of the evidence in  
23 this case. If the government fails to sustain its burden as to  
24 the defendant, you must find him not guilty.

25 So what about reasonable doubt? I have said that the

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1 government must prove the defendant guilty beyond a reasonable  
2 doubt, and the question naturally is, what is reasonable doubt?  
3 The words alone almost define themselves. It is a doubt based  
4 upon reason and common sense. It is a doubt that a reasonable  
5 person has after carefully weighing all of the evidence. It is  
6 a doubt which would cause a reasonable person to hesitate to  
7 act in a matter of importance in his or her personal life.  
8 Proof beyond a reasonable doubt must, therefore, be proof of  
9 such a convincing character that a reasonable person would not  
10 hesitate to rely and act upon it in the most important matters  
11 of his or her own affairs. A reasonable doubt is not a caprice  
12 or a whim. It is not a speculation or a suspicion. It is not  
13 an excuse to avoid the performance of an unpleasant duty. And  
14 it is not sympathy.

15 In a criminal case, the burden is at all times upon  
16 the government to prove guilt beyond a reasonable doubt. The  
17 law does not require the government to prove guilt beyond all  
18 possible doubt. Proof beyond a reasonable doubt is sufficient  
19 to convict. The burden never shifts to the defendant, as I  
20 said, and that means that it is always the government's burden  
21 to prove each of the elements of the crimes charged beyond a  
22 reasonable doubt.

23 If after fair and impartial consideration of all the  
24 evidence you have a reasonable doubt, it is your duty to acquit  
25 the defendant. On the other hand, if after fair and impartial

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1 consideration of all of the evidence you are satisfied of the  
2 defendant's guilt beyond a reasonable doubt, you should vote to  
3 convict.

4 You have had the opportunity now to observe all of the  
5 witnesses, including expert witnesses. It is now your job to  
6 decide how believable each witness was in his or her testimony.  
7 You are the sole determiners of the credibility of each witness  
8 and of the importance of witness testimony.

9 So how do you determine where the truth lies? Well,  
10 you should use all the tests for truthfulness that you would  
11 use in determining matters of importance to you in your  
12 everyday lives. You should consider any bias or hostility that  
13 a witness may have shown for or against any party as well as  
14 any interest the witness has in the outcome of the case. It is  
15 your duty to consider whether the witness has permitted any  
16 such bias or interest to color his or her testimony.

17 You should consider the opportunity that the witness  
18 had to see, to hear, and to know the things about which they  
19 testified, the accuracy of their memory, their candor or lack  
20 of candor, their intelligence, the reasonableness and  
21 probability of their testimony and its consistency or lack of  
22 consistency, and its corroboration or lack of corroboration  
23 with other believable testimony. You watched the witnesses  
24 testify. Everything a witness said or did on the witness stand  
25 counts in your determination. How did the witness appear?

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1 What was the witness' demeanor while testifying? Often it is  
2 not what people say but how they say it that moves us.

3 In deciding whether to believe a witness, keep in mind  
4 that people sometimes forget things. So you need to consider  
5 whether in such a situation the witness' testimony reflects an  
6 innocent lapse of memory or an intentional falsehood, and that  
7 may depend on whether it has to do with an important fact or  
8 with only a small detail. It is not the number of witnesses  
9 called in a case but rather their credibility when called to  
10 the witness stand that is directly at issue.

11 In addition, the fact that a witness may be employed  
12 as a law enforcement official does not mean that his or her  
13 testimony is deserving of more or less consideration or greater  
14 or lesser weight than that of an ordinary witness.

15 If you find that any witness has willfully testified  
16 falsely as to a material fact; that is, material meaning an  
17 important matter, the law permits you to disregard completely  
18 the entire testimony of that witness upon the principle that  
19 one who testifies falsely about one material fact is likely to  
20 testify falsely about everything. But you are not required to  
21 consider such a witness as totally unworthy of belief. You may  
22 accept so much of the witness' testimony as you deem true and  
23 disregard what you feel is false. As the sole judges of the  
24 facts, you must decide which of the witnesses you will believe,  
25 what portion of their testimony you accept and what weight you

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1 will give to it.

2 Let's just talk a minute about expert testimony.  
3 You've heard from what we call expert witnesses: Aaron Zelin  
4 was one. He talked about terrorist groups. He's an expert in  
5 that field. Abdelmajid Fouad, an English-Arabic translation  
6 expert; DJ Fife, a fingerprint expert; Michael McFarlane, an  
7 electronics device forensic expert; heather LaSalle, a DNA  
8 analysis expert; Robert Mothershead, a forensic chemical  
9 analysis expert; and David DeFusco, an explosives analysis  
10 expert. An expert is allowed to express his or her opinion on  
11 matters about which he or she has specialized knowledge and  
12 training. Expert testimony is presented to you on the theory  
13 that someone who is experienced in the field can assist you in  
14 understanding the evidence or in reaching an independent  
15 decision on the facts.

16 In weighing the expert's testimony, you may consider  
17 the expert's qualifications, his or her opinions, his or her  
18 reasons for testifying, as well as all of the other  
19 considerations that ordinarily apply when you are deciding  
20 whether to believe a witness' testimony. You may give expert  
21 testimony whatever weight, if any, you find it deserves in  
22 light of all of the evidence in the case. You should not,  
23 however, accept this witness' testimony merely because he or  
24 she is an expert, nor should you substitute it for your own  
25 reason, judgment and common sense. The determination of the

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1 facts in this case, as I've said before, rests solely with you,  
2 the jurors.

3           There are two kinds of evidence: One is called direct  
4 evidence and the other is circumstantial evidence. Direct  
5 evidence is direct proof of a fact, such as testimony by a  
6 witness about what that witness personally experienced through  
7 his or her senses. So, something seen, something felt,  
8 something touched, something heard or something tasted. Direct  
9 evidence may also be in the form of an exhibit where the fact  
10 to be proven is its present existence or condition.

11           Circumstantial evidence is evidence which tends to  
12 prove a disputed fact by proof of other facts. There is a  
13 simple example of circumstantial evidence that is often cited  
14 by myself and other judges.

15           Assume that when you came into the courtroom this  
16 morning the sun was shining and it was a nice day. Assume that  
17 the courtroom blinds are drawn, as they are, and you cannot  
18 look outside. Assume further that as you are sitting here,  
19 someone walked into the courtroom with an umbrella that was  
20 dripping wet. Then a few minutes later another person also  
21 entered the courtroom with a wet umbrella. Now, you cannot  
22 look outside of the courtroom windows because, as I said, the  
23 blinds were drawn and so you cannot see directly whether or not  
24 it is raining, so you have no direct evidence of that fact.  
25 But on the combination of facts which I've asked you to assume,

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1 it would be reasonable for you to conclude that it had been  
2 raining.

3 That is all there is to circumstantial evidence. You  
4 infer on the basis of reason and experience and common sense  
5 from one established fact the existence or non-existence of  
6 some other fact. The matter of drawing inferences from facts  
7 in evidence is not a matter of guesswork or speculation. An  
8 inference is a logical, factual conclusion which you might  
9 reasonably draw from other facts that have been proved.  
10 Circumstantial evidence is of no less value than direct  
11 evidence. The law makes no distinction between direct evidence  
12 and circumstantial evidence but simply requires that your  
13 verdict must be based on all of the evidence that's been  
14 presented to you.

15 Now we are going to move to the eighth counts in this  
16 case. Let's talk first about Counts One and Two. They relate  
17 to the use and attempted use of a weapon of mass destruction.

18 The federal law that defendant is charged with  
19 violating in Counts One and Two is a provision of the United  
20 States Code referred to as 18 United States Code Section  
21 2332a(a)(2) and that section provides as follows. I'm going to  
22 quote it and then I'm going to explain it to you. So it says  
23 that: A person who, without lawful authority uses ... or  
24 attempts to use a weapon of mass destruction ... against any  
25 person or property within the United States and either -- I'm

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1 going to give you four options here -- either (1) the mail or  
2 any facility of interstate or foreign commerce is used in  
3 furtherance of the offense; or (2) such property is used in  
4 interstate or foreign commerce or in an activity that affects  
5 interstate or foreign commerce; or (3) any perpetrators travels  
6 in or causes another to travel in interstate or foreign  
7 commerce in furtherance of the offense; or (4) the offense, or  
8 the results of the offense, affect interstate or foreign  
9 commerce; or, in the case of an ... attempt ... would have  
10 affected interstate or foreign commerce, such a person has  
11 committed a crime.

12 To satisfy its burden of proof with respect to the  
13 crimes charged in Count One and Count Two, each count specifies  
14 one crime, so in connection with Counts One and Two, the  
15 government must under this statute that I've just read to you,  
16 establish the following four elements beyond a reasonable  
17 doubt.

18 First, that the defendant knowingly used, or, with  
19 respect to Count Two, attempted to use, a weapon of mass  
20 destruction.

21 Second, that the defendant knowingly used or attempted  
22 to use a weapon of mass destruction against a person or against  
23 real or personal property in the United States.

24 Third, that the defendant did not have lawful  
25 authority to use or attempt to use the weapon of mass



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1 destruction.

2 Fourth is also an either/or situation. Fourth, either  
3 (1) the mail or any other facility of interstate commerce was  
4 used in furtherance of the crime; or (2) the property involved  
5 was used in interstate or foreign commerce or in an activity  
6 that affects interstate or foreign commerce; or (3) the  
7 defendant traveled in interstate commerce in furtherance of the  
8 crime; or (4) the offense or the results of the offense  
9 affected interstate or foreign commerce.

10 So I have just described four elements. You may think  
11 I did it in detail. I'm going to describe in more detail each  
12 of those four elements.

13 The first element: The use or attempted use of a  
14 weapon of mass destruction.

15 So the first element that the government must prove  
16 beyond a reasonable doubt is that the defendant knowingly used  
17 or attempted to use a weapon of mass destruction. A weapon of  
18 mass destruction for the purpose of Counts One and Two is  
19 defined to include, among other things, any explosive or  
20 incendiary bomb or similar device.

21 The word "knowingly" means that the act was done  
22 voluntarily and intentionally and not because of a mistake or  
23 an accident or mere negligence or some other innocent reason.

24 The word "unlawfully" simply means contrary to law.  
25 The defendant need not have known that he was violating any

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1 particular law or rule. The defendant need only have been  
2 aware of the generally unlawful nature of his acts.

3 Count One charges the defendant with using a weapon of  
4 mass destruction in connection with the 23rd Street device.  
5 Count Two charges the defendant with both using a weapon of  
6 mass destruction and attempting to use a weapon of mass  
7 destruction in connection with the 27th Street device.

8 If you find that the government has proven beyond a  
9 reasonable doubt that the defendant did, in fact, use a weapon  
10 of mass destruction with respect to Count Two, then you do not  
11 have to consider the question of whether the defendant also  
12 attempted to use a weapon of mass destruction. If, however,  
13 you find that the government has not proven beyond a reasonable  
14 doubt that the defendant used a weapon of mass destruction, you  
15 must then consider with respect to Count Two whether the  
16 government has proven that the defendant attempted to use a  
17 weapon of mass destruction.

18 In order to find the defendant guilty on Count Two  
19 under an attempt theory, the government must prove beyond a  
20 reasonable doubt the following two items, two things:

21 First, that the defendant intended to commit the crime  
22 charged, as I have and will describe that crime to you; and

23 Second, the defendant willfully took some action that  
24 was a substantial step in an effort to bring about or  
25 accomplish the crime.

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1           Mere intention to commit a specific crime does not  
2 amount to an attempt. To convict the defendant of an attempt,  
3 you must find beyond a reasonable doubt that the defendant  
4 intended to commit the crime charged and that he took some  
5 action that was a substantial step toward the commission of the  
6 crime. In determining whether the defendant's actions amounted  
7 to a substantial step toward the commission of the crime, you  
8 must distinguish between mere preparation on the one hand and  
9 the actual doing of the criminal deed on the other.

10           Mere preparation, without more, is not an attempt. On  
11 the other hand, some preparations when taken together may  
12 amount to an attempt. The question for you to decide is  
13 whether the acts of the defendant clearly indicate a willful  
14 intent to commit the crime and whether those acts are a  
15 substantial step in a course of conduct planned to culminate in  
16 the commission of the crime.

17           If you find, therefore, that the government has proven  
18 beyond a reasonable doubt that the defendant knowingly used a  
19 weapon of mass destruction, or with respect Count Two, that he  
20 attempted to use a weapon of mass destruction, then the first  
21 element of this offense is satisfied.

22           Conversely, if you find that the government has not  
23 proven beyond a reasonable doubt that the defendant knowingly  
24 used a weapon of mass destruction or with respect to Count Two,  
25 that he attempted to use a weapon of mass destruction, then the

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1 first element of the offense is not satisfied.

2 So the second element: The second element used or  
3 attempted to be used against property within the United States.  
4 The second element that the government must prove beyond a  
5 reasonable doubt for purposes of both Counts One and Two is  
6 that the weapon of mass destruction described in each count was  
7 knowingly used or, with respect to Count Two, was attempted to  
8 be used against a person or against real or personal property  
9 within the United States.

10 I have already defined the terms "knowingly" and  
11 "attempt" for you. Those definitions apply here as well.

12 The United States for the purposes of these offenses  
13 include the 50 states of the United States, the District of  
14 Columbia and the commonwealths, territories and possessions of  
15 the United States.

16 "Property" includes, among many other things, land and  
17 buildings.

18 If you find, therefore, that the government has proven  
19 beyond a reasonable doubt that the weapon of mass destruction  
20 was knowingly used or attempted to be used against a person or  
21 against real or personal property within the United States, the  
22 second element of the offenses charged in Counts One and Two is  
23 satisfied.

24 Conversely, if you find that the government has not  
25 proven beyond a reasonable doubt that the weapon of mass

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1 destruction was knowingly used or attempted to be used against  
2 a person or against real or personal property within the United  
3 States, then the second element of the offenses charged in  
4 Counts One and Two is not satisfied.

5 The third element: The defendant did not have lawful  
6 authority to use or attempt to use the weapon of mass  
7 destruction.

8 The third element that the government must prove  
9 beyond a reasonable doubt for the purpose of Counts One and Two  
10 is that the defendant did not have lawful authority to use or  
11 attempt to use the weapon of mass destruction related to each  
12 count.

13 Lawful authority in this context would require that a  
14 person be expressly permitted and authorized by law to possess  
15 and use a weapon of mass destruction.

16 Thus, if you find that the government has proven  
17 beyond a reasonable doubt that the defendant did not have  
18 lawful authority to use or attempt to use the weapon of mass  
19 destruction described in each count, the third element of  
20 Counts One and Two is satisfied.

21 Conversely, if you find that the government has not  
22 proven beyond a reasonable doubt that the defendant did not  
23 have lawful authority to use or attempt to use the weapon of  
24 mass destruction described in each count, then the third  
25 element of Counts One and Two is not satisfied.

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1           And the fourth element is relating to interstate  
2 commerce. So the fourth element that the government must prove  
3 beyond a reasonable doubt for purposes of both Counts One and  
4 Two relates to interstate commerce and is called a  
5 jurisdictional element. As I said or attempted to say before,  
6 there are four ways that the government must meet its burden as  
7 to this element of Counts One and Two. Let me try and explain  
8 each of those.

9           First, the government may prove that the mail or other  
10 facility of interstate commerce was used in furtherance of the  
11 crime.

12           The term "interstate commerce" means commerce which  
13 affects more than one state. It includes commercial activity  
14 between any place in one state and another place outside that  
15 state. It also includes commerce activity wholly within one  
16 state and another place outside that state. It also includes  
17 commercial activity wholly within one state but which has a  
18 substantial affect on commerce between or among the states. It  
19 also includes any movement or transportation of people,  
20 including the defendant, goods or merchandise from one state to  
21 another.

22           The term "facility of interstate commerce" includes  
23 any means of transportation and communication. So that is one  
24 aspect of satisfying the jurisdictional element.

25           The second is that the government may prove that the

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1 property involved; that is, the property targeted by the weapon  
2 of mass destruction, was itself used in interstate or foreign  
3 commerce or in an activity that affects interstate or foreign  
4 commerce.

5 A third way that the government may prove that the  
6 defendant traveled in interstate commerce -- I'm sorry. The  
7 third manner is that the government may prove that the  
8 defendant traveled in interstate commerce in furtherance of the  
9 crime.

10 Or, fourth, the government may prove that the offense  
11 or offenses or the results of the offenses affected interstate  
12 or foreign commerce. It is only necessary the government prove  
13 beyond a reasonable doubt that the crime had some minimal  
14 effect on interstate commerce. It is not necessary to find  
15 that the defendant knew or intended that his actions would  
16 affect interstate commerce.

17 The government does not need to prove each of these  
18 four alternatives. It need only prove one. But you must as a  
19 jury unanimously determine as to which one you think has been  
20 proven.

21 If you find, therefore, that the government has proven  
22 beyond a reasonable doubt any one of these four alternatives  
23 regarding interstate commerce, then the fourth element of the  
24 offense is satisfied.

25 Conversely, if you find that the government has not

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1 proven beyond a reasonable doubt any one of these four  
2 alternatives, then the fourth element of the offense is not  
3 satisfied.

4 Now we move to Count Three, termed bombing a place of  
5 public use. The federal law that the defendant is charged with  
6 violating in Count Three is a provision of the United States  
7 Code designated 18 U.S.C. Section 233f, and that provision  
8 provides as follows. So I will read, as I did before, the text  
9 and then try to explain each element more fully.

10 Whoever unlawfully delivers, places, discharges or  
11 detonates an explosive or other lethal device in, into or  
12 against a place of public use ... with the intent to cause  
13 death or serious bodily injury or ... with the intent to cause  
14 extensive destruction of such a place, where such destruction  
15 results in or is likely to result in major economic loss [has  
16 committed a crime if] ... the offense takes place in the United  
17 States and ... [either] the offense is committed in an attempt  
18 to compel another state or the United States to do or abstain  
19 from doing any act ... [or] a victim is a national of another  
20 state or a stateless person.

21 To satisfy its burden of proof with respect to the  
22 crime charged in Count Three, the government must establish  
23 each of the following four elements beyond a reasonable doubt:

24 First, that the defendant knowingly delivered, placed,  
25 discharged or detonated an explosive in, into or against a



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1 place of public use in the vicinity of W. 23rd Street in New  
2 York City.

3 Second, that the defendant did so either intending to  
4 cause death or serious bodily injury or intending to cause  
5 extensive destruction of a place of public use, where extensive  
6 destruction results in, or was likely to result in, major  
7 economic loss.

8 The third element of this offense is that the offense  
9 took place in the United States.

10 And the fourth element is that either the offense was  
11 committed in an attempt to compel the United States to do or to  
12 abstain from doing any act or that the victim is a national of  
13 another country.

14 So, as is my practice, we are going to go into these  
15 elements in somewhat more detail.

16 So the first element: Knowing delivery, placement,  
17 discharge or detonation of an explosive device, in, into or  
18 against a place of public use. What does that mean?

19 The first element that the government must prove  
20 beyond a reasonable doubt for the purpose of Count Three is  
21 that the defendant knowingly delivered or placed or discharged  
22 or detonated an explosive judge in, into or against a place of  
23 public use in the vicinity of W. 23rd Street in New York City.

24 The term "place of public use" means those parts of  
25 any building, land, street or other location that are

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1 accessible or open to members of the public whether  
2 continuously, periodically or occasionally and also encompasses  
3 any commercial, business, cultural, historical, entertainment,  
4 recreational or similar place that is so accessible and open to  
5 the public.

6           The term "explosive" means "gunpowders or powders used  
7 for blasting, all forms of high explosive, blasting materials,  
8 fuses (other than electrical circuit breakers), detonators and  
9 other detonating agents, smokeless powders ... and any chemical  
10 compounds, mechanical mixture or device that contains any  
11 oxidating and combustible units or other ingredients, in such  
12 preparations, quantities or packing that ignition by fire, by  
13 friction, by concussion, by percussion or by detonation of the  
14 compound, mixture or device or any part thereof may cause an  
15 explosion." Also included within the statute's definition of  
16 "explosive" is "dynamite and all other forms of high explosives  
17 ... any bomb, grenade, missile or similar device and ... any  
18 incendiary bomb or grenade, fire bomb, or similar device,  
19 including any device which ... consists of or includes a  
20 breakable container including a flammable liquid or compound  
21 and a wick composed of any material which, when ignited, is  
22 capable of igniting such flammable liquid or compound and ...  
23 can be carried or thrown by one individual acting alone."

24           If you find, therefore, that the government has proven  
25 beyond a reasonable doubt that the defendant knowingly

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1 delivered or placed or discharged or detonated a explosive in,  
2 into or against a place of public use, then the first element  
3 of this offense charged in Count Two is satisfied.

4           Conversely, if you find that the government has not  
5 proven beyond a reasonable doubt that the defendant knowingly  
6 delivered or placed or discharged or detonated an explosive in,  
7 into or against a place of public use, then the first of  
8 element of this offense charged in Count Three would not be  
9 satisfied.

10           The second element: The intent to cause death,  
11 serious bodily injury or extensive destruction.

12           The second element that the government must prove  
13 beyond a reasonable doubt for the purpose of Count Three is  
14 that the defendant committed the crime either intending to  
15 cause death or serious bodily injury or intending to cause  
16 extensive destruction in a place of public use where extensive  
17 destruction results in, or was likely to result in, major  
18 economic loss.

19           As you can see, there are two alternative ways the  
20 government may prove this element: First, by proving that the  
21 defendant committed the crime intending to cause death or  
22 serious bodily injury. Or, second, by proving that the  
23 defendant committed the crime with the intent to cause  
24 extensive destruction to a place of public use where that  
25 destruction resulted in, or was likely to result in, major

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1 economic loss. The government does not need to prove both of  
2 these types of intent. It need only prove one. But you must  
3 be unanimous as to which, if either, type of intent you find.

4 The term "serious bodily injury" means bodily injury  
5 which involves any one of the following: A substantial risk of  
6 death or extreme physical pain, or protracted and obvious  
7 disfigurement, or protracted loss or impairment of the  
8 functions of a bodily member, organ, or mental faculty.

9 If you find, therefore, that the government has proven  
10 beyond a reasonable doubt either of the two types of intent  
11 that I have just described to you, then the second element of  
12 the offense is satisfied.

13 Conversely, if you find that the government has not  
14 proven beyond a reasonable doubt either of the two types of  
15 intent I have just described to you, then the second element of  
16 the offense is not satisfied.

17 The third element: That the offense took place in the  
18 United States.

19 The third element that the government must prove  
20 beyond a reasonable doubt for the purpose of Count Three -- we  
21 are still talking about Count Three -- is that the offense took  
22 place in the United States.

23 I have already defined "United States" for you and  
24 that same definition applies here.

25 Thus, if you find that the government has proven

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1 beyond a reasonable doubt that the offense took place within  
2 the United States, then the third element of the offense is  
3 satisfied.

4           Conversely, if you find that the government has not  
5 proven beyond a reasonable doubt that the offense took place  
6 within the United States, the third element of the offense is  
7 not satisfied.

8           Fourth element: That the offense was committed to  
9 compel the United States to do or to abstain from doing any act  
10 or that a victim is a national of another country or state.  
11 "State" here means country.

12           The fourth element that the government must prove  
13 beyond a reasonable doubt for purposes of Count Three is either  
14 that: The offense was committed in an attempt to compel the  
15 United States to do or to abstain from doing any act, or that  
16 the victim is a national of another state as defined just a  
17 minute ago.

18           As you can see, there are two alternative ways the  
19 government may prove this element. First, the government may  
20 prove that the offense was committed in an attempt to compel  
21 the United States to do or to abstain from doing any act. Or,  
22 second, the government may prove that the victim of the offense  
23 is a national of another state.

24           The government does not need to prove both of these  
25 alternatives, but you must agree unanimously that the

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1 government has proven beyond a reasonable doubt at least one of  
2 them.

3 For purposes of Count Three, the term "national of  
4 another state" means, among other things, a citizen of another  
5 country.

6 If you find, therefore, that the government has proven  
7 beyond a reasonable doubt either of these two alternatives as I  
8 have just explained them to you, the fourth element of the  
9 offense is satisfied.

10 Conversely, if you find that the government has not  
11 proven beyond a reasonable doubt either of these two  
12 alternatives as I've just explained them to you, then the  
13 fourth element of the offense is not satisfied.

14 Let's do Counts Four and Five, and then we are going  
15 to take a lunch break, and then after that lunch break, I will  
16 do the rest of the counts: Count Six, Count Seven, Count Eight  
17 and then some more general instructions. Let's talk about

18 Counts Four and Five termed destruction and attempted  
19 destruction of property by means of explosives.

20 The federal law that defendant is charged with  
21 violating in Counts Four and Five is a provision of the United  
22 States Code titled 18 United States Code 2332f and it provides  
23 in relevant part:

24 Whoever maliciously damages or destroys, or attempts  
25 to damage or destroy by means of ... an explosive, any

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1 building, vehicle or other real or personal property used in  
2 interstate or foreign commerce or in any activity affecting  
3 interstate or foreign commerce [is guilty of a crime].

4 To satisfy its burden of proof with respect to the  
5 crimes charged in Counts Four and Five, the government must  
6 establish each of the following three elements beyond a  
7 reasonable doubt:

8 The first element is that the defendant used an  
9 explosive to damage or destroy, or in an attempt to damage or  
10 destroy, property.

11 Second, that the property was used in or affecting  
12 interstate or foreign commerce.

13 Third, that the defendant acted maliciously.

14 So let's take each element one at a time, each of  
15 those three elements.

16 The first element: Use of an explosive to damage or  
17 destroy, or attempt to damage or destroy, property.

18 For purposes of Counts Four and Five the first element  
19 that the government must prove beyond a reasonable doubt is  
20 that the defendant used an explosive to damage or destroy, or  
21 in an attempt to damage or destroy, property.

22 Remember that Count Four charges the defendant with  
23 destruction and attempted destruction of property by means of  
24 an explosive in connection with the 23rd Street device. So for  
25 this count, you must find that the government has proven beyond

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1 a reasonable doubt either that the defendant either damaged or  
2 destroyed property or that he attempted to damage or destroy  
3 property. The government does not have to prove both. It need  
4 only prove one or the other, but you must be unanimous as  
5 jurors as to which, if either, you choose.

6 Count Five charges the defendant with attempted  
7 destruction of property by means of an explosive in connection  
8 with the 27th Street device. So, with respect to Count Five,  
9 the government must prove beyond a reasonable doubt that the  
10 defendant used an explosive in an attempt to damage or destroy  
11 property.

12 I have already defined "explosive" to you in my  
13 instructions relating to Count Three, and you can refer to that  
14 in the written instructions that you will have.

15 I have already also defined the concept of "attempt"  
16 to you in my instructions in Count Two, and I refer you to  
17 those instructions here as well.

18 If you find, therefore, that the defendant damaged or  
19 destroyed or attempted to damage or destroy property by means  
20 of explosives, then the first element of Counts Four and Five  
21 is satisfied.

22 Conversely, if you find that the government has not  
23 proven beyond a reasonable doubt that the defendant damaged or  
24 destroyed, or attempted to damage or destroy, property by means  
25 of explosives, the first element of Counts Four and Five is not



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1 satisfied.

2 So the second element: That the property was used in  
3 or affecting commerce.

4 The second element that the government must prove  
5 beyond a reasonable doubt for the purposes of Counts Four and  
6 Five is that the property was used in or affecting interstate  
7 or foreign commerce.

8 I have already defined "affecting interstate or  
9 foreign commerce" for you in connection with my instructions on  
10 Counts One and Two, and I refer you to those instructions here  
11 for the definitions.

12 For the purposes of Counts Four and Five, the  
13 government does not have to prove that the materials used to  
14 destroy or damage any building, vehicle, or real or personal  
15 property were in or affecting interstate commerce. The  
16 government also does not have to prove that the defendant knew  
17 that the property was actively used for some commercial  
18 purpose.

19 If you find, therefore, that the government has proven  
20 beyond a reasonable doubt that the property in question comes  
21 within the definition of "property used in or affecting  
22 interstate commerce" as I have previously described that to  
23 you, then the second element of Counts Four and Five would be  
24 established.

25 Conversely, if you find that the government has not

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1 proven beyond a reasonable doubt that the property in question  
2 comes within the definition of "property used in or affecting  
3 interstate commerce" as I have previously described it to you,  
4 then the second element of Counts Four and Five would not be  
5 satisfied.

6 The third element: Malicious intent.

7 The third element that the government must prove  
8 beyond a reasonable doubt for purposes of both Counts Four and  
9 Five is that the defendant acted with malicious intent.

10 To act with malicious intent means to act either  
11 intentionally or with a willful disregard of the likelihood  
12 that damage will result, and not mistakenly or carelessly. In  
13 order to find the defendant guilty, you must find that the  
14 defendant used the explosive with the intent to cause damage or  
15 harm or that he did so recklessly and without regard to the  
16 likelihood that such damage or harm would result.

17 So we have just been talking about Counts Four and  
18 Five. With respect to Count Four alone, this additional  
19 instruction, and this will be reflected on your verdict sheet  
20 as well.

21 So, with respect to Count Four only, if, and only if,  
22 you find that the government has proven beyond a reasonable  
23 doubt the above three elements, then you must consider one  
24 additional question with regard to Count Four: Has the  
25 government also proven beyond a reasonable doubt that the

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1 defendant's conduct; that is, his alleged planting and  
2 detonation of the 23rd Street device directly or proximately  
3 resulted in injury to another person.

4 "Directly caused" means that the conduct of the  
5 defendant directly resulted in an injury to another person.

6 "Proximately caused" means that there was a sufficient  
7 causal connection between the act of the defendant and the  
8 injury of another person. An act is a proximate cause if it  
9 was a substantial factor in bringing about or actually causing  
10 injury; that is, if the injury was a reasonably foreseeable  
11 consequence of the defendant's act.

12 Personal injury means any injury, no matter how  
13 temporary or severe. It includes physical pain as well as any  
14 burn, cut, abrasion, bruise, disfigurement, illness or  
15 impairment of a bodily function.

16 For purposes of this inquiry, it is not relevant  
17 whether the defendant intended for his unlawful conduct to  
18 cause injury to another person. The question being asked of  
19 you here is, having already found beyond a reasonable doubt  
20 that the defendant committed the offense alleged in Count Four  
21 of the indictment, do you additionally find that his unlawful  
22 conduct in fact caused injury to another person.

23 I will note now that before you retire to  
24 deliberate -- I think I referred to this before, but I will  
25 mention it right here -- I am going to provide you with a

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1 verdict sheet or verdict form. That is the form that you will  
2 use to record your verdict. You will see when you get into the  
3 jury room that there is a question on the verdict form that  
4 asks you to record if you vote to convict the defendant on  
5 Count Four asks you an additional question, whether you  
6 unanimously find that the government has additionally proven  
7 beyond a reasonable doubt that the defendant's unlawful conduct  
8 caused injury to another person.

9 So I think we are going to stop here for a break. I  
10 have to do Counts Six, Seven and Eight and then some additional  
11 instruction. This is a good time to take a lunch break. So I  
12 am going to give you today until 2:00. You have two hours. If  
13 you want to use the cafeteria, you may.

14 I'm sorry. I'd forgotten. So we've got lunch for you  
15 ordered. I think it's going to arrive, if it hasn't, by 12:30,  
16 somewhere around there. So we are not finished with the  
17 instructions so you are not to deliberate. You may go out  
18 after you eat or whenever you like, but be back at 2:00. All  
19 right? See you later.

20 (Jury recessed)

21 THE COURT: Ms. Shroff, Mr. Rahimi wished to leave  
22 around 12:00, as I understood.

23 MS. SHROFF: I appreciate that, your Honor. Could he  
24 leave?

25 THE COURT: Yes.

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1 MR. LARSEN: Your Honor, would the Court --

2 THE COURT: Would you just relax for a minute,

3 Mr. Larsen. Please be seated.

4 Before I thought it was inappropriate to raise an  
5 objection at the end of rebuttal. I said you could write  
6 something to me, what your objection was, and I'm going to  
7 reiterate that. If you would like to preview what you are  
8 going to write, I would like what you are going to write to be  
9 here in an hour and to give the government an opportunity to  
10 respond in writing if they wish. But I will hear a preview of  
11 your objections.

12 MR. LARSEN: There are three grounds for our  
13 objections, your Honor. In its rebuttal argument, the  
14 government misstated the law, attempted to shift the burden to  
15 the defense, and misstated the facts in front of the jury.

16 First on misstating the law, the government said, "As  
17 long as Mr. Rahimi took a substantial step, he is guilty of  
18 attempt. Leaving the bomb on the street, under the law that is  
19 enough for attempt."

20 As your Honor has instructed the jury, that is not  
21 enough for attempt. There are two elements for attempt. There  
22 is substantial step and intent. The government misstated the  
23 law and did so grossly, and on the element that we are alleging  
24 the government failed to prove beyond a reasonable doubt,  
25 that's our defense.

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Secondly --

THE COURT: Hold on. These are arguments that go to the rebuttal?

MR. LARSEN: Indeed.

THE COURT: So, one is that the Mr. DeFilippis misstated the law?

MR. LARSEN: Yes, the requirements for finding by attempt. He mentioned only the substantial step requirement stating, "As long as he took a substantial step, he is guilty. Leaving the bomb on the street, under the law that is enough for attempt."

THE COURT: OK, I got it.

MR. LARSEN: Secondly, your Honor, with respect to Count Five, he also misstated the law. He focused on the third element, the malicious intent element and said essentially that recklessness or carelessness suffices. He, however, ignored the first element of Count Five, which your Honor just described in his charge, which is attempt, and that charge properly states that attempt is defined under Count Two as requiring both substantial step and intent.

That's on page 30 of the jury instructions.

Next, your Honor, burden shifting.

THE COURT: This is three?

MR. LARSEN: Yes. At the beginning or near the beginning of the rebuttal the government stated, that "the

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1 defense argument will not be enough to convince you." As the  
2 government well knows, defendant has no burden to convince the  
3 jury of anything. The defendant only as to point out the holes  
4 in the government's case and its failure to prove guilt beyond  
5 a reasonable doubt. The government shifted the burden.

6 Next, your Honor --

7 THE COURT: I thought you said you only had three?

8 MR. LARSEN: This is the final one.

9 THE COURT: Four?

10 MR. LARSEN: That was the second one, your Honor. The  
11 Count Five misstated --

12 THE COURT: Wait. Wait. Wait.

13 MR. LARSEN: First is the misstatement as to the  
14 requirements for attempt.

15 THE COURT: Yes, I got that.

16 MR. LARSEN: Second is the misstatement of the law  
17 with regard to Count Five.

18 THE COURT: I got that.

19 MR. LARSEN: Third which I will now describe -- excuse  
20 me. Third is the burden shifting. I misspoke. I'm sorry.

21 THE COURT: I thought so.

22 MR. LARSEN: Third is the burden shifting.

23 Fourth, your Honor, was the misstatement of facts and  
24 inflaming of the jury. In this area the government referred to  
25 grenades, bank robbery, kidnapping, Ms. Merritt's lifeless son.

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1 These are all gross misstatements of fact. Ms. Merritt's son  
2 was not lifeless. There was no bank robbery in this case, no  
3 kidnapping, no grenades in this case.

4 He then referenced the testimony of the victims of the  
5 23rd Street blast and said that "there was no doubt from their  
6 testimony that Mr. Rahimi must be guilty of all the charges."  
7 Obviously, the 23rd Street victims speaking of the injuries  
8 that they sustained do not go to the elements of the 27th  
9 Street count, certainly not by beyond a reasonable doubt.  
10 These misstatements of fact were designed solely to inflame the  
11 jury, especially since they came at the end of rebuttal.

12 We would ask for two things, your Honor. We would ask  
13 for a mistrial, and failing that, we would ask for your Honor  
14 to reference these statements and explain to the jury that they  
15 were improper statements of law and fact and that the jury is  
16 to follow your Honor's instructions as given.

17 THE COURT: Do you want to put that in writing or do  
18 you want to rest on what you've just said?

19 MR. LARSEN: We can rest on that, your Honor.

20 THE COURT: Do you want to respond or do you want to  
21 respond in writing?

22 MR. BOVE: We'd be happy to respond now, Judge.

23 In the context of a rebuttal summation, the government  
24 is not required to cite each and every element. Mr. DeFilippis  
25 elected during his rebuttal summation --



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1 THE COURT: You're talking about the law of attempt  
2 now?

3 MR. BOVE: Yes, I'm talking about the law of attempt  
4 and the law relating to Count Five.

5 THE COURT: Let's do one at a time. He did, so let's  
6 just do one at a time.

7 MR. BOVE: With respect to the law --

8 THE COURT: Mr. Larsen said that Mr. DeFilippis  
9 misstated the law of attempt.

10 MR. BOVE: That's incorrect. He simply elected to  
11 focus on one component of attempt, which is the substantial  
12 step requirement.

13 Moreover, and in any event, the Court's instructions  
14 cured any problem with the argument that was made, both in that  
15 they correctly described the law of intent and instructed the  
16 jury multiple times that the arguments of lawyers to the extent  
17 they depart from what your Honor is instructing them are to be  
18 disregarded.

19 THE COURT: Also in the instruction it says if any  
20 lawyer stated the law different from what I've stated, it's my  
21 statement that governs.

22 MR. BOVE: You said that immediately after the  
23 rebuttal summation.

24 THE COURT: And Count Five? A misstatement of Count  
25 Five.

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1 MR. BOVE: Same two responses, your Honor. First, the  
2 rebuttal elected to focus on the maliciousness element of Count  
3 Five. That's not improper. We're allowed to pick what we want  
4 to focus on in rebuttal. In any event, your Honor instructed  
5 the jury in the manner you just described.

6 THE COURT: And then burden shifting.

7 MR. BOVE: The argument --

8 THE COURT: I'm not exactly sure what burden got  
9 shifted, but -- I mean, what burden is alleged to have been  
10 shifted, Mr. Larsen?

11 MR. LARSEN: The burden of proof beyond a reasonable  
12 doubt.

13 THE COURT: You think that Mr. DeFilippis --

14 MR. LARSEN: Excuse me. The burden on the government  
15 to prove guilt. Mr. DeFilippis said, "The defense argument  
16 won't be enough to convince you," implying the defense has a  
17 burden of convincing the jury that Mr. Rahimi is innocent.  
18 That is not the law.

19 MR. BOVE: That is not at all what was implied in that  
20 argument. The point of that argument was, as I said twice  
21 yesterday to the jury, that they should be scrutinizing what  
22 the defense is saying to them and that this argument was not  
23 convincing. In any event, your Honor is and will continue to  
24 instruct the jury about the burden of proof and where it rests.

25 THE COURT: I think there's one more.

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1 MR. BOVE: And, Judge, if I could just add, that term  
2 "convince" was actually right out of the evidence that was on  
3 the screen at the time from *Inspire* magazine about a story to  
4 convince the jury. It was a reference to that.

5 Finally, on the alleged misstatements of fact, the  
6 references to I believe bank robbery and kidnapping were by  
7 analogy. They were clearly by analogy and, therefore,  
8 appropriate in the context of rebuttal summation.

9 And the government's summary of Ms. Merritt's  
10 testimony, your Honor heard it yesterday, that's a fair  
11 inference from what she described about the state of her son  
12 after the bomb went off and blew out the back window of the  
13 car.

14 THE COURT: OK. I'll think about it. Why don't you  
15 come back at 1:30 and I'll give you a ruling then.

16 MR. BOVE: Thank you, Judge.

17 We also have made the government's exhibits that are  
18 in evidence available to the extent the defense wants to  
19 inspect them. We've got a laptop available. They are here in  
20 the courtroom.

21 THE COURT: Those are all the exhibits?

22 MR. BOVE: Yes, Judge, sitting on that cart with the  
23 binders. There is a laptop that we've obtained that has no  
24 files on it other than the software necessary for the jurors to  
25 review videos that are in evidence. The defense is welcome to

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1 inspect that as well. We spoke with Ms. Murray during one of  
2 the breaks about providing an indictment with the forfeiture  
3 allegation redacted. We'll bring that up when we come back.

4 And if there is anything else the Court needs for  
5 purposes of deliberations, please let us know, and we'll get  
6 that together.

7 THE COURT: So I am, as you know, a little more, but  
8 not that much more, than halfway through. So when they come  
9 back, I will complete the instructions and then depending where  
10 we are time-wise, they will begin their deliberations.

11 Nice to see you. See you later.

12 (Luncheon recess)

13 (Continued on next page)

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1 (Jury not present)

2 THE COURT: So let's just spend a couple of minutes on  
3 the defense application made after the lunch break today. So  
4 this was an application for mistrial, and I'm trying to think  
5 how to phrase this. The best way I can think of is that --  
6 maybe I'm old school, no doubt, but in my experience an  
7 application for a mistrial is serious business, although I must  
8 say in this case the defense has been making such an  
9 application at almost seems like at the drop of a hat, and I  
10 haven't yet to be able to find any reasonable basis for  
11 granting such a serious motion in the applications before today  
12 and in the application today. So today's application for a  
13 mistrial regards the government's rebuttal. I think it's no  
14 different than the other applications and, that is to say, it  
15 has no merit that I could discern.

16 But over the lunch break I was looking at jury  
17 instructions and transcripts, etc., and I was unable to  
18 locate -- I hope you don't think this is impolite -- but I  
19 couldn't find an ounce of merit to support that application.  
20 But I will give this the benefit of the doubt.

21 My first instinct this morning or at the break was  
22 that we have this in writing. And so I think that was the  
23 correct instinct. If the defense has something serious to say  
24 in support of an application for a mistrial, then you can do it  
25 in writing by 7 p.m. tonight and the government can respond by

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1 noon tomorrow and then I will give you a ruling.

2 MR. LARSEN: Judge, if I may clarify. We understand  
3 your ruling denying our mistrial application. We did ask in  
4 the alternative that the jury be instructed the specific --

5 THE COURT: I don't think you're hearing me. I don't  
6 think you're hearing me.

7 MR. LARSEN: We understand that the mistrial --

8 THE COURT: I think you're not listening or whatever.  
9 I said that my preliminary reaction was that there is no merit  
10 to the application. But I'm giving you, I guess, the benefit  
11 of the doubt. And as my instinct was this morning, that if you  
12 have something serious to say about the rebuttal, whether  
13 you're seeking a mistrial or a further instruction, whatever it  
14 is you're seeking, you put it in writing and you cite relevant  
15 authorities and then I'll take a look at it. I'm not going to  
16 jump every six minutes on your behalf you know when you stand  
17 up and yell mistrial. So that's the way we're going to deal  
18 with it.

19 (Continued on next page)

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(Trial resumed; Jury present; time noted: 2:23 p.m.)

THE COURT: Before we broke, I had given instructions with respect to Counts One through Five and we were up to Number Six. So that's where I'm going to pick up. So Count Number Six has to do with interstate transportation and receipt of explosives.

The federal law that the defendant is charged with violating in Count Six is a provision in the United States Code, referred to as 18 United States Code Section 844(d) which says in relevant part the following:

Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosives with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property is guilty of a crime.

To satisfy the burden of proof with respect to the crime charged in Count Six, the government has to establish each of the following three elements beyond a reasonable doubt:

First, that the material involved was an explosive. I already defined for you the term explosive in my instructions with respect to Count Three, and I refer you to those instructions here.

Second, that the defendant transported or received an explosive in interstate commerce, or attempted to do so. That

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1 is, you must determine whether an explosive was, in fact,  
2 transported between one state and another because of the  
3 defendant's actions, or whether the defendant attempted to move  
4 an explosive between one state and another. I have already  
5 defined for you the term interstate commerce and explained the  
6 concept of attempt and refer you to those instructions here. I  
7 further note that the government does not need to prove that an  
8 explosive was both received and transported in interstate  
9 commerce. It need only prove one or the other and that an  
10 explosive was either transported or received. But you, the  
11 jurors, must be unanimous as to which, if either, you select.

12 And the third element is that the defendant acted with  
13 the knowledge or intent that the explosive would be used to  
14 injure or intimidate any individual, or would be unlawfully  
15 used to damage or destroy any building, vehicle, or other real  
16 or personal property. Once again, the government need only  
17 prove one of these, but you must be unanimous as to which one,  
18 if either, that you choose.

19 Also, I note that here you do not need to find that  
20 the explosive actually injured or intimidated a person, or that  
21 the explosive was actually used to unlawfully damage a building  
22 or property. Rather, you need only to find that the defendant  
23 acted with the knowledge or intent that the use of the  
24 explosive would have any of those effects.

25 So, in this -- with regard to this count there's also



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1 a special interrogatory, we call it, or one additional question  
2 raised and applies to Count Six. And the instruction about  
3 that interrogatory -- interrogatory just means question in this  
4 regard -- the instruction is that if, but only if you find that  
5 the government has proven beyond a reasonable doubt each of the  
6 three elements of Count Six, then you must consider one  
7 additional question: Has the government proven beyond a  
8 reasonable doubt that the defendant's conduct directly or  
9 proximately resulted in injury to another person?

10 I have already defined the terms directly and  
11 proximately and injury for you in connection with my  
12 instruction on Count Four and you should refer to those  
13 definitions there.

14 As I've already explained to you with respect to Count  
15 Four, the verdict form we will use to record your verdict will  
16 also include the question of whether, if you vote to convict  
17 the defendant on Count Six, you unanimously find that the  
18 government has proven beyond a reasonable doubt that the  
19 defendant's conduct directly and proximately caused injury to  
20 another person.

21 So now we come to Counts Seven and Eight, deal with  
22 them together. And then I have some more what you might call  
23 more general instructions after that. But we'll be finished  
24 with the counts in the indictment once we finish this, Counts  
25 Seven and Eight.

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1           This refers to the use of a destructive device during  
2           and in relation to a crime of violence.

3           The federal law that the defendant is charged with  
4           violating in Counts Seven and Eight is a provision in the  
5           United States Code at 18 United States Code Section 924(c)(1).  
6           And that statute states as follows:

7           A person who, during and in relation to any crime of  
8           violence for which the person may be prosecuted in a court of  
9           the United States, uses or carries a destructive device is  
10          guilty of a crime.

11          To satisfy the burden of proof with respect to the  
12          crimes charged in Counts Seven and Eight, the government must  
13          establish each of the following two elements beyond a  
14          reasonable doubt.

15          First, that the defendant committed a crime of  
16          violence for which he may be prosecuted in a court of the  
17          United States;

18          Second, that the defendant knowingly used or carried a  
19          destructive device during and in relation to the commission of,  
20          or knowingly possessed a destructive device in furtherance of,  
21          the specific crimes of violence.

22          So two elements. Let's go into those two elements in  
23          a little bit more detail. First, the first element, which is  
24          commission of the predicate crime or the crime of violence.

25          Counts Seven and Eight, for both of them, the first

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1 element that the government has to prove beyond a reasonable  
2 doubt is that the defendant committed a crime of violence for  
3 which he might be prosecuted in a court of the United States.

4 The defendant in this case is charged in Count Seven  
5 of the indictment with committing three specific crimes of  
6 violence for which he might be prosecuted in a court of the  
7 United States and those three are: Use of a weapon of mass  
8 destruction as set forth in Count One; bombing a place of  
9 public use as set forth in Count Three; and destruction of  
10 property by means of explosion in Count Four.

11 So I instruct you that each of these crimes -- Count  
12 One, Count Three, and Count Four -- is a crime of violence for  
13 which the defendant can be, and is here being, prosecuted in a  
14 court of the United States. It is for you, the jurors, to  
15 determine whether the government has proven beyond a reasonable  
16 doubt that the defendant committed any of those crimes as  
17 charged.

18 You need not find that the defendant committed all  
19 three counts, that is, each of Counts One, Three, and Four.  
20 Rather, it is sufficient if you find that the defendant  
21 committed either Count one, Count Three, or Count Four or some  
22 combination of more than one of those counts.

23 If upon all of the evidence you find that the  
24 government has proven none of Counts One, Three, or Four beyond  
25 a reasonable doubt, then you are required to return a verdict

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1 of not guilty on Count Seven. In other words, Count Seven is  
2 to be considered only if you first found the defendant guilty  
3 of either Count One, Count Three, Count Four, or some  
4 combination of more than one of those counts.

5 In reaching your verdict on Count Seven, you may  
6 consider the evidence of Counts One, Three, and Four only for  
7 the purpose of determining whether the elements of Count Seven  
8 have been satisfied.

9 Got it.

10 So now let me talk about Count Eight. The defendant  
11 is charged in Count Eight of the indictment with committing two  
12 specific crimes of violence for which he might be prosecuted in  
13 a court of the United States and those two are: Attempted use  
14 of a weapon of mass destruction as set forth in Count Two; and  
15 attempted destruction of property by means of explosion as set  
16 forth in Count Five.

17 So I instruct you that each of these crimes -- Count  
18 Two and Count Five -- is a crime of violence for which the  
19 defendant can be, and is here being, prosecuted in a court of  
20 the United States. It is for you to determine, however,  
21 whether the government has proven beyond a reasonable doubt  
22 that the defendant committed either of those crimes as charged.

23 You need not find that the defendant committed both  
24 counts, both crimes, that is, Counts Two and Five. Rather, it  
25 is sufficient if you find that the defendant committed either

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Count Two or Count Five.

If upon all of the evidence you find that the government has proven neither Counts Two or Five beyond a reasonable doubt, then you are required to return a verdict of not guilty on Count Eight. In other words, Count Eight is to be considered only if you first found or find that the defendant is guilty of either Count Two or Count Five or both Count Two and Count Five.

In reaching your verdict on Count Eight, you may consider the evidence of Counts Two and Five only for the purpose of determining whether the elements of Count Eight have been satisfied.

So that's the first element.

The second element of Counts Seven and Eight relates to use or carrying of a destructive device during, in relation to or in furtherance of a crime of violence.

So this second element is that the government must prove beyond a reasonable doubt for purposes of Count Seven and Count Eight that the defendant knowingly used or carried a destructive device during and in relation to one of the specified crimes of violence, or the defendant knowingly possessed a destructive device in furtherance of the commission of one of the specified crimes of violence.

A destructive device is defined by the statute to include, among other things, any explosive bombs. It is also

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1 defined to include any combination of parts either designed or  
2 intended for use in converting any device into any destructive  
3 device and from which a destructive device may be readily  
4 assembled. A device is considered a destructive device for  
5 purposes of Counts Seven and Eight so long as it is capable of  
6 exploding. And that is true even if the device could not  
7 explode in the way its maker intended because, for example, it  
8 lacked some component.

9 In this case there has been evidence presented  
10 regarding the nature and characteristics of the 23<sup>rd</sup> Street  
11 and 27<sup>th</sup> Street devices. It is for you, the jurors, to  
12 determine from all of the evidence whether each of these  
13 devices was a destructive device.

14 To prove that the defendant used the destructive  
15 device, the government must prove beyond a reasonable doubt an  
16 active employment of the destructive device by the defendant  
17 during and in relation to at least one of the specified crimes  
18 of violence. This does not mean that the defendant must have  
19 actually detonated the destructive device, although that  
20 obviously would constitute use of that device.

21 In order to prove that the defendant carried the  
22 destructive device, the government must prove beyond a  
23 reasonable doubt that the defendant had the device within his  
24 control in such a way that it furthered at least one of the  
25 specified crimes of violence, or that the destructive device

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1 was an integral part of the commission of at least one of the  
2 specified crimes of violence.

3 To prove that the defendant possessed the destructive  
4 device in furtherance of a crime of violence, the government  
5 must prove that the defendant had possession of the device and  
6 that such possession was in furtherance of at least one of the  
7 specified crimes of violence. Possession means that the  
8 defendant either had physical possession of the device on his  
9 person, or that he had dominion and control over the place  
10 where the device was located and had the power and intention to  
11 exercise control over the device. To possess a destructive  
12 device in furtherance of the crime means that the device helped  
13 forward, advance or promote the commission of the crime. The  
14 mere possession of the destructive device at the scene of the  
15 crime is not sufficient under this definition. The device must  
16 have played some part in furthering the crime in order for this  
17 element to be satisfied.

18 To satisfy this element, you must also find that the  
19 defendant carried or used the destructive device knowingly.  
20 This means that he carried the device purposely and voluntarily  
21 and not by accident or mistake. It also means that he knew  
22 that the weapon was a destructive device. However, the  
23 government is not required to prove that the defendant knew  
24 that he was breaking the law.

25 So we got through the substantive counts. So now just

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1 a few more -- ten minutes, fifteen minutes more of more generic  
2 instructions.

3 One has to do with multiple counts.

4 As I mentioned to you at the beginning, the defendant  
5 is charged with eight counts in the indictment. Each count  
6 charges the defendant with a different crime. You must  
7 consider each count of the indictment separately, and you must  
8 return a separate verdict on each count. The case on each  
9 count stands or falls upon the proof or lack of proof on that  
10 count. Your verdict on any count should not control your  
11 decision on any one other count, except, as I previously  
12 instructed you with regards to Counts Seven and Eight.

13 At the end I'm going to go through the verdict sheet  
14 and explain how that relates to these instructions.

15 The next topic is called venue. So in addition to all  
16 of the elements that I have described, with respect to each  
17 count charged in the indictment, you, the jurors, must consider  
18 the issue of venue, namely, whether any act in furtherance of  
19 the unlawful activity occurred within the Southern District of  
20 New York. And the Southern District of New York includes  
21 Manhattan.

22 If the crime charged was committed in more than one  
23 district, venue is proper in any district in which the crime  
24 was begun, continued, or completed. Thus, venue will lie in  
25 the Southern District of New York if you find that any part of



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1 the crime took place here.

2 The government's burden of proof with respect to  
3 establishing venue under each count of the indictment is by  
4 what's called a preponderance of the evidence. To prove  
5 something by a preponderance of the evidence means to prove  
6 that something is more likely true than not true. It is  
7 determined by considering all of the evidence and deciding  
8 which evidence is more convincing. If the evidence appears to  
9 be equally balanced, or if you cannot say on which side it  
10 weighs heavier, you resolve the question of venue against the  
11 government.

12 If you find that venue has not been proven, then you  
13 must find the defendant not guilty as to that count.

14 Similar acts. We discussed this during the course of  
15 the trial. The government has offered evidence tending to show  
16 that on different occasions in Seaside Park and Elizabeth,  
17 New Jersey the defendant engaged in conduct similar to the  
18 conduct charged in the indictment in this case.

19 In that connection, I remind you that the defendant is  
20 not on trial for committing those acts not alleged in the  
21 indictment. Accordingly, you may not consider this evidence of  
22 the similar act as a substitute for proof that the defendant  
23 committed the crimes charged. Nor may you consider this  
24 evidence as proof that the defendant has a criminal personality  
25 or bad character. The evidence of other similar acts was

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1 admitted for a much more limited purpose and you may consider  
2 it only for that limited purpose.

3 If you determine that the defendant committed the acts  
4 charged in the indictment and the similar acts as well, then  
5 you may, but you need not, draw an inference that in doing the  
6 acts charged in the indictment, the defendant acted knowingly  
7 and intentionally and not because of some mistake, accident, or  
8 other innocent reason.

9 Evidence of a similar act may not be considered by you  
10 for any other purpose. Specifically, you may not use this  
11 evidence to conclude that because the defendant committed the  
12 other acts he must also have committed the acts charged in the  
13 indictment.

14 Publicity. Your verdict must be based solely on the  
15 evidence presented in this courtroom in accordance with my  
16 instructions. You must disregard completely any report that  
17 you may have read in the press, seen on TV or on the internet,  
18 or heard on the radio, assuming there were such reports.  
19 Indeed, it would be unfair to consider such reports, since they  
20 are not evidence and the parties have no opportunity to  
21 contradict their accuracy or otherwise address them.

22 In short, it would be a violation of your oath as  
23 jurors to allow yourselves to be influenced in any manner by  
24 such publicity.

25 The next instruction relates to what are called

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1 particular investigative techniques not required.

2           You have heard reference in the arguments of defense  
3 counsel in this case to the effect that certain investigative  
4 techniques were not used by the government. There is no legal  
5 requirement that the government prove its case through any  
6 particular means.

7           Your concern is to determine whether, on the evidence  
8 or lack of evidence, the guilt of the defendant has been proven  
9 beyond a reasonable doubt for each count.

10           You have heard evidence during the trial that  
11 witnesses have discussed the facts of the case and their  
12 testimony with the lawyers before the witnesses appeared in  
13 court.

14           Although you may consider that fact when you are  
15 evaluating a witness's credibility, you should keep in mind  
16 that there is nothing either unusual or improper about a  
17 witness meeting with lawyers before testifying so that the  
18 witness can be aware of the subjects he or she will be  
19 questioned about, focus on those subjects, and have the  
20 opportunity to review relevant exhibits before being questioned  
21 about them. Such consultation helps conserve your time and the  
22 Court's time. In fact, it would be unusual for a lawyer to  
23 call a witness without having such a consultation beforehand.

24           Again, the weight you give to the fact or the nature  
25 of the witness's preparation for his or her testimony and what

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1 inferences you draw from such preparation are matters  
2 completely within your, the jurors', discretion.

3 In this case you also heard evidence in the form of  
4 stipulations of fact. A stipulation of fact is an agreement as  
5 we earlier discussed between the parties that a certain fact is  
6 true and you should regard such agreed facts as true.

7 The defendant in this case chose not to testify.  
8 Under our Constitution, a defendant has no obligation to  
9 testify or to present any evidence because it is the  
10 government's burden to prove a defendant guilty beyond a  
11 reasonable doubt. A defendant is never required to prove that  
12 he or she is innocent.

13 Therefore, you must not attach any significance to the  
14 fact that the defendant did not testify. No adverse inference  
15 against the defendant may be drawn by you because he or she did  
16 not take the witness stand, and you may not consider it in any  
17 way in your deliberations in the jury room.

18 In determining whether the government has proven the  
19 charges beyond a reasonable doubt, you should not consider the  
20 question of possible punishment in the event you were to find  
21 the defendant guilty on one or more counts. Under our system  
22 sentencing, or punishment, is exclusively the function of the  
23 Court. It is not your concern and you should not give any  
24 consideration to that issue in determining what your verdict  
25 will be.

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1 Charts, summaries, and drawings.

2 Some charts, summaries, and drawings were shown to you  
3 to make the other evidence more meaningful and to aid you in  
4 considering the evidence. These charts, summaries, and  
5 drawings are no better than the testimony or the documents upon  
6 which they are based and are not themselves independent  
7 evidence. Therefore, you are to give no greater consideration  
8 to these charts, summaries or drawings than you would give to  
9 the evidence upon which they are based.

10 It is for you to decide whether the charts, summaries,  
11 or drawings correctly present the information in the testimony  
12 or the documents on which they were based. You are entitled to  
13 consider the charts, summaries and drawings if you find that  
14 they are of assistance to you in analyzing the evidence and  
15 understanding the evidence.

16 You have heard testimony about evidence that was  
17 seized in various searches. Evidence obtained from these  
18 searches was properly admitted in this case and may be properly  
19 considered by you. Whether you approve or disapprove of how it  
20 was obtained should not enter into your deliberations because I  
21 now instruct you that the government's use of this evidence is  
22 entirely lawful.

23 Under your oath as jurors you are not to be swayed by  
24 sympathy. You are to be guided solely by the evidence in this  
25 case, and the crucial question that you must ask yourselves as

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1 you sift through this evidence is: Has the government proven  
2 its case beyond a reasonable doubt? You are to determine this  
3 solely on the basis of the evidence and subject to the law as I  
4 have explained it to you.

5 You have heard the testimony of various members of law  
6 enforcement. The fact that a witness may be employed by the  
7 government as a law enforcement official or employee does not  
8 mean that his or her testimony is necessarily deserving of more  
9 or less consideration or greater or lesser weight than that of  
10 an ordinary witness.

11 At the same time, it is quite legitimate for defense  
12 counsel to try to attack the credibility of a law enforcement  
13 witness on the grounds that his or her testimony may be colored  
14 by a personal or professional interest in the outcome of the  
15 case.

16 It is your decision, the juror's decision, after  
17 reviewing all of the evidence whether to accept the testimony  
18 of the law enforcement or government employee witness, as it is  
19 with every other type of witness, and to give that testimony  
20 the weight you find it deserves.

21 Now, ladies and gentlemen, you are about to go into  
22 the jury room and begin your deliberations. We'll talk about  
23 timing in a minute. All of the evidence and exhibits other  
24 than the dumpster will be given to you at the start of  
25 deliberations. If you want any of the testimony read back or

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1 the video clips played, or if you wish to view the dumpster,  
2 you may also request that. I'll do my best to arrange for you  
3 to see all of that evidence that you request. Please remember  
4 that if you do ask for testimony, the reporter must search  
5 through his or her notes and the lawyers must agree on what  
6 portions of testimony may be called for, and if they disagree I  
7 must resolve those disagreements. That can be a time consuming  
8 process. So please try to be as specific as you possibly can  
9 in requesting portions of the testimony, if you, in fact, you  
10 do.

11 Your requests for testimony -- in fact any  
12 communications with the Court -- should be made to me in  
13 writing, signed by your foreperson -- I'll come to that in a  
14 minute -- and given to one of the marshals who will be outside  
15 the jury room. In any event, do not tell me or anyone else how  
16 the jury stands on any issue until after a verdict is reached.

17 Some of you have taken notes during parts of the  
18 trial. You were free to do that. But please recall my earlier  
19 instruction regarding note-taking. Notes can be helpful to  
20 focus a note-taker's attention and may aid the recollection of  
21 the note-taker but they are not themselves evidence in the  
22 case. Notes should be used solely to refresh the note-taker's  
23 recollection of the testimony, and are not a substitute for the  
24 transcript of the testimony, which has been taken down verbatim  
25 by the court reporter. And please remember that if notes were

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1 taken of the lawyers' arguments, the lawyers' arguments, as  
2 I've said several times, are not evidence.

3 The government, to prevail, must prove the essential  
4 elements of any crime charged beyond a reasonable doubt, as I  
5 hopefully explained to you in these instructions. If it  
6 succeeds, your verdict should be guilty; if it fails, your  
7 verdict should be not guilty.

8 A verdict must be unanimous. Your verdict must  
9 represent the considered judgment of each juror; whether your  
10 verdict is guilty or not guilty, it must be unanimous.

11 Your function is to weigh the evidence in the case and  
12 determine whether or not the defendant is guilty, solely upon  
13 the basis of such evidence.

14 Each juror is entitled to his or her opinion; each  
15 should, however, exchange views with his or her fellow jurors.  
16 That is the very purpose of jury deliberation -- to discuss and  
17 consider the evidence; to listen to the arguments of fellow  
18 jurors; to present your individual views; to consult with one  
19 another; and to reach an agreement based solely and entirely  
20 upon the evidence if you can do so without surrendering your  
21 own individual judgment.

22 Each of you must decide the case for yourself, after  
23 consideration with your fellow jurors of the evidence in the  
24 case.

25 But you should not hesitate to change an opinion that,



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1 after discussion with your fellow jurors, appears incorrect.

2 If, after carefully considering the evidence and the  
3 arguments of your fellow jurors, you hold a conscientious view  
4 that differs from the others, you are not required to change  
5 your position simply because you are outnumbered.

6 Your final vote must reflect your conscientious belief  
7 as to how the issues should be decided.

8 So when you get into the jury room the first thing I'd  
9 like you to do before you begin your deliberations is to select  
10 someone from among you to be the foreperson. Your foreperson  
11 will preside over the deliberations and speak for you here in  
12 open court. The foreperson has no greater voice or authority  
13 than any other jurors. The foreperson will send out any notes  
14 and, when the jury has reached a verdict, he or she will notify  
15 the marshal that the jury has reached a verdict.

16 So the foreperson can literally be any of the jurors.  
17 And I would like you to do that function at the outset, select  
18 a foreperson; and then if the person selected could send me a  
19 note early on just saying I have been selected as the  
20 foreperson.

21 I'm also going to give you, as I said before, a  
22 verdict sheet to be filled out by the jury. The purpose of the  
23 questions on the form is to help us, that is to say the Court  
24 and the attorneys, to understand what your findings are. I  
25 will hand this form to Christine who will give it to you so

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1 that you may record the decision of the jury with respect to  
2 each question.

3 No inference is to be drawn from the way the questions  
4 are worded as to what the answer should be. The questions are  
5 not to be taken as any indication that I have any opinion as to  
6 how they should be answered. I have no such opinion, and even  
7 if I did, as I've said before, it would not be binding on you.

8 Before the jury attempts to answer any question on the  
9 verdict sheet you should read all the questions and make sure  
10 that everybody understands each question. Before you answer  
11 the questions, you should deliberate in the jury room and  
12 discuss the evidence that relates to the questions that you  
13 must answer. When you have considered the questions  
14 thoroughly, and the evidence that relates to those questions,  
15 record the answers to the questions on the form that I am  
16 giving you. And remember, all answers must be unanimous.

17 So it's no secret. There are eight questions, one  
18 question for each count. And then you remember that two counts  
19 have associated with it the possibility of an additional  
20 question. So there's a question 4(a) so to speak and a  
21 question 6(a) if they are applicable in accordance with my  
22 earlier instructions.

23 I am nearly finished with these charges and my  
24 instructions to you and I thank you for your patience and  
25 attentiveness not only today but throughout the trial.

HAD9RAH3

1           May I say this because I think -- not because I think  
2       it's necessary but because it's the tradition in this court. I  
3       remind the jurors to be polite and respectful to each other, as  
4       I'm sure you will be, in the course of your deliberations so  
5       that each juror may have his or her position made clear to all  
6       the others. I also remind you once again that your oath is to  
7       decide without fear or favor and to decide the issues based  
8       solely on the evidence and my instructions on the law.

9           So if you could just sit still for one second I'll see  
10      the lawyers at the sidebar just for a second.

11          I should mention it's just about three o'clock. The  
12      normal day is 4:45 we end. So when you -- when the foreperson  
13      sends me the note who the foreperson is it would be helpful if  
14      you just indicate how long you want to deliberate today. Okay.  
15      I'll be with you in one minute.

16           (Continued on next page)

HAD9RAH3

1 (At the sidebar)

2 THE COURT: So the question is: Does either side have  
3 any objections to the reading of the instructions as opposed to  
4 the substance of the instructions?

5 MR. BOVE: No, Judge.

6 One practical issue. The instructions indicated that  
7 the jurors would come out if they want to see video clips. We  
8 do have --

9 THE COURT: No. We didn't really say what we're going  
10 to do.

11 MR. BOVE: Okay. A laptop is available.

12 THE COURT: Let's wait and see.

13 You mean they're available to send in there?

14 MR. BOVE: The videos are available and there's a  
15 laptop available to have in the jury room for deliberations. I  
16 just wanted to make that clear.

17 THE COURT: Let's wait and see.

18 Any objection?

19 MS. SHROFF: No.

20 THE COURT: Okay.

21 MS. SHROFF: Your Honor, is the evidence going to go  
22 in?

23 THE COURT: Is which?

24 MS. SHROFF: Is the evidence --

25 THE COURT: Yes.

HAD9RAH3

1 MS. SHROFF: I don't know who was planning to wheel it  
2 in.

3 THE COURT: You should definitely look through it.

4 MR. BOVE: We did that at lunch, your Honor.

5 THE COURT: Do it now.

6 MS. SHROFF: We should do it now before the jury goes  
7 into the --

8 (Continued on next page)

HAD9RAH3

1 (In open court)

2 THE COURT: So we'll give you copies of the  
3 instructions and of the verdict sheet and we'll escort you to  
4 the jury room.

5 Hold on one second. Do we want to swear in the  
6 marshal who is going to supervise the jury room.

7 (Marshal sworn).

8 THE COURT: Marshal will you take the jurors. Let's  
9 say jurors one through twelve. The first two rows.

10 The four in the back, if you could hold on for now.

11 (At 3:02 p.m., the jury retired to deliberate)

12 THE COURT: Please be seated.

13 As it turns out you four jurors are alternates. We  
14 always have alternate jurors at the beginning of the trial. We  
15 never know if, as, and when they are going to be called into  
16 service. In this case it doesn't look like it.

17 So I will say it's okay to go home but I don't  
18 technically discharge the alternates until we have a verdict  
19 from the jury. So there is the possibility that you could  
20 still be called to help with deliberations.

21 So thank you again very much. If you would go with  
22 Christine she'll escort you out. Thanks again.

23 (Alternates excused)

24 THE COURT: Please be seated or not as you like.  
25 We're just going to wait and hear from the jury. You're

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welcome to stay or go as you like.

(Recess pending verdict)

HADQRAH4

(Jury note received 3:10 p.m.)

THE COURT: We have a note first note from the jurors. It says Juror No. 10 Eric Obenzinger has been selected as foreperson, and we would like to deliberate until 4:30.

So at 4:30 I'll call them out, give them my instructions for over the weekend how they should conduct themselves, and then see everybody 9:15 on Monday. Thanks a lot.

(Recess pending verdict)

(Jury note received 4:30 p.m.)

THE COURT: We just got a note from the jurors that says: We would like another 30 minutes to deliberate. Foreperson.

I'm going to say fine, if that's OK with you.

MR. BOVE: Yes, your Honor. Thank you.

MS. SHROFF: If they want to, that's fine.

(Recess pending verdict)

(Jury note received 5:16 p.m.)

MR. LARSEN: I got a note from the jury saying:

Judge, we are very near a consensus but would like additional time. Maybe return Monday for further deliberations.

So my inclination is to respond: Sure. 9:15 on Monday.

Is that OK?



HADQRAH4

1 MS. SHROFF: That's fine, your Honor.

2 MR. BOVE: Yes, Judge. Thank you.

3 (Jury present)

4 THE COURT: Please be seated for a minute. I got your  
5 note, and I think you got my response. 9:15 Monday in the jury  
6 room. That would be fine. That's October 16. Let me give you  
7 instructions for between now and then.

8 The first one is a little bit of a modified one that I  
9 gave consistently during the week, and it is: Do not talk to  
10 each other about the case or about anyone who has anything to  
11 do with it unless you are all together in the jury room. So we  
12 say no deliberation unless all the jurors are present. So  
13 don't do any further deliberation until you are all here on  
14 Monday.

15 Second, do not talk with anyone else about this case  
16 or about anyone who has anything to do with it until the trial  
17 is ended and you have been discharged as jurors. And by "talk"  
18 I'm referring to email, text, tweeting, blogging and any type  
19 of communication in any type of forum including Facebook, My  
20 Space, Twitter, Instagram, Snapchat, etc.

21 Additionally, do not remain in the presence of other  
22 persons who may be discussing this case face to face, orally or  
23 online. Anyone else includes members of your family and your  
24 friends and embraces social media as well. You may tell them  
25 that you are a juror in a case, but don't tell them anything

HADQRAH4

1 else about the case until after you've been discharged by me.

2 Third, do not let anyone talk to you about the case or  
3 about anyone who has anything to do with it. And if someone  
4 should try and talk to you about the case, please report that  
5 to me immediately or Christine. We will give you a number, a  
6 contact number over the weekend for chambers in case you had to  
7 get ahold of Christine or me.

8 Fourth, do not read any news or internet stories or  
9 articles or blogs or listen to any radio or TV or cable TV or  
10 internet reports about the case or about anyone who has  
11 anything to do with it.

12 Fifth, do not do any type of research or any type of  
13 investigation about the case on your own. For example, don't  
14 visit any of the scenes described during trial.

15 The parties, as I've said before, are entitled to have  
16 you personally render a verdict in this case on the basis of  
17 your independent evaluation of the evidence presented here in  
18 the courtroom. So obviously speaking to others about the case,  
19 including your family, before you deliberate completely or  
20 exposing yourself to evidence outside the courtroom in any way  
21 would compromise your jury service and fairness to the parties.

22 Hold on one second.

23 (Pause)

24 THE COURT: So Christine will remind you in the jury  
25 room to leave your notes and information back there. We will

HADQRAH4

1 safeguard it and we will have coffee and tea, etc. for you on  
2 Monday. Great. Have a great weekend.

3 THE JURY: Thank you.

4 (Jury recessed)

5 THE COURT: Please be seated.

6 I think that's it. And you should have a nice weekend  
7 yourselves. See you Monday.

8 (Deliberations continued September 16, 2017 at  
9 9:15 a.m.)